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WILD DUNES AND SERBONIAN BOGS: THE IMPACT OF THE *LUCAS* DECISION ON SHORELINE PROTECTION PROGRAMS

RICHARD C. AUSNESS*

INTRODUCTION.

In *Lucas v. South Carolina Coastal Council*,¹ the United Supreme Court was forced once again to delve into the law of regulatory takings.² This experience is seldom a pleasant one. Echoing the poet John Milton, an exasperated state court judge once described takings law as a "Serbonian Bog."³ Unfortunately, the takings doctrine is only slightly more comprehensible after the *Lucas* decision than it was before. Nevertheless, progress in this area, however modest, deserves praise, and the Court is to be commended for clarifying one aspect of takings jurisprudence. As a result of *Lucas* a "categorical rule" has been announced that provides for compensation when a state regulation deprives a landowner of all economically valuable property use.⁴

The claimant in *Lucas* owned two unimproved beachfront lots in the Wild Dunes Resort on the Isle of Palms, a barrier island located near Charleston, South Carolina. In 1988, the state legislature enacted a law that authorized the South Carolina Coastal Council to establish construction setback lines.⁵ The purpose of these setback lines was to mitigate the effects of erosion in coastal areas.⁶ The Coastal Council established a setback line landward of Lucas' back property line, effectively preventing him from building on either of his lots.⁷ Lucas brought suit, arguing that the regulation constituted a taking of his

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1. 112 S. Ct. 2886 (1992).

2. The takings or just compensation clause of the fifth amendment provides that private property may not be taken for public use without payment of just compensation. U.S. CONST. amend. V. Governmental actions that do not physically appropriate private property, but instead unduly restrict its use, are known as regulatory takings. See Nathaniel S. Lawrence, *Regulatory Takings: Beyond the Balancing Test*, 20 URB. LAW. 389, 390 (1988).

3. *City of Austin v. Teague*, 570 S.W.2d 389, 391 (Tex. 1978) ("arguing that regulatory taking law is a sophistic Miltonian Serbonian Bog") (quoting *Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 105 (Tex. 1962)). The reference is to a description of Hell from Milton's *Paradise Lost*:

A gulf profound as that Serbonian bog
Betwixt Damiata and Mount Casius old,
Where armies whole have sunk: the parching air
Burns froze, and cold performs the effects of fire.

JOHN MILTON, *PARADISE LOST*, Bk. II, ll. 592-95.

4. *Lucas*, 112 S. Ct. at 2895.

5. S.C. Code Ann. §§ 48-39-270, 280 (Law. Co-op. Supp. 1991).

6. Natasha Zalkin, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute*, 79 CAL. L. REV. 205, 220-21 (1991).

7. *Lucas*, 112 S. Ct. at 2889-90.

property without just compensation. The state trial court, in ruling for the claimant, concluded that the regulation left the property with virtually no market value.⁸ The South Carolina Supreme Court overturned the trial court decision by concluding that the state may pass regulations to prevent harm to the public without having to pay compensation.⁹

Having granted certiorari,¹⁰ the Court held that compensation must be paid if a police power regulation deprives a landowner of all economically valuable use of his or her property.¹¹ This decision produced a bitter division within the Court. This Article argues that the categorical takings rule set forth by the majority in *Lucas* is analytically sound and fully consistent with the true meaning of the Takings Clause. Furthermore, the Article concludes that *Lucas* reflects a long overdue reorientation of the Court's takings jurisprudence in favor of private property rights. At the same time, however, the categorical takings rule of *Lucas* is fairly narrow and should not threaten most state shoreline protection programs.

The Article is divided into four parts. Part I reviews the property regime of coastal areas as well as some representative shoreline management schemes. Part II explores the "Serbonian Bog"—the law of regulatory takings. Part III examines South Carolina's Beachfront Management Act and analyzes the *Lucas* decision in some detail. Finally, Part IV evaluates the significance of *Lucas* and discusses its potential impact on various aspects of shoreline management and environmental protection.

I. THE LEGAL REGIME OF COASTAL AREAS.

A. *Private and Public Rights Along the Shoreline.*

In most states, the mean high water line marks the boundary between public and private ownership in the shoreline.¹² Although land above the mean high water line is subject to private ownership, public rights are paramount in the area below (or seaward of) this line.¹³

8. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 907 (S.C. 1991) (Harwell, J., dissenting).

9. *Id.* at 900-02.

10. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 436 (1991).

11. *Lucas*, 112 S. Ct. at 2893-94.

12. Frank E. Maloney & Richard C. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. REV. 185, 200-201 (1974). The mean high water line represents the intersection of a vertical tidal datum with the shoreline. *Id.* at 195. Tidal datums are elevations based on the average rise and fall of the tide. See Peter K. Nunez, Comment, *Fluctuating Shoreline and Tidal Boundaries: An Unresolved Problem*, 6 SAN DIEGO L. REV. 447, 451-52 (1969). These datums are generally calculated on the basis of a nineteen year period of observations. This period is used to determine tidal datums because all of the cycles related to the phases, declinations, and distance of the moon occur within this time frame. Maloney & Ausness, *supra*, at 198.

13. Richard C. Ausness, *Land Use Controls in Coastal Areas*, 9 CAL. W. L. REV. 391, 396 (1973). In some states, the mean low water line constitutes the usual boundary between public and private shoreline property. State ex rel. Buckson v. Pennsylvania R.R., 228 A.2d 587, 601 (Del. Super. Ct. 1967); Michaelson v. Silver Beach Improvement Ass'n, Inc., 173 N.E.2d 273, 275 (Mass. 1961); In re Hadlock, 48 A.2d 628, 630 (Me. 1946); Whealton

Both Roman law¹⁴ and English common law,¹⁵ acknowledged that members of the public could use the foreshore and adjacent tidal waters for purposes of navigation, fishing and commerce.¹⁶ This right was known as the *jus publicum*.¹⁷ In the United States, the *jus publicum*, which includes recreation as well as more traditional public uses,¹⁸ is protected by a concept known as the public trust doctrine. According to this doctrine, the state holds title to the foreshore and the land beneath navigable waters in trust for the benefit of the public.¹⁹ Even when the state transfers such property into private ownership, public rights are not entirely lost as long as the property remains physically capable of being used for trust purposes.²⁰

Most of the shoreline above the mean high water line is now privately owned and those who own such property typically possess certain littoral rights. The most important of these littoral rights is access to the water.²¹ Littoral owners also possess the right to navigate, fish, swim and bathe in the sea and its surrounding tidal waters.²² Finally, these owners get the benefit of any increase in littoral property caused by the deposit of soil on the land by currents or other natural forces.²³ Conversely, they risk losing any land that erodes away when the shoreline recedes.²⁴

& *Wisherd v. Doughty*, 82 S.E. 94, 96 (Va. 1914); *Commonwealth ex rel. Hensel v. Y.M.C.A.*, 32 A. 121, 127 (Pa. 1895); *Nudd v. Hobbs*, 17 N.H. 524, 526 (1845).

14. Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 21-36 (1976); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633-43 (1986); Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 763-64 (1970).

15. Richard C. Ausness, *Water Rights, the Public Trust Doctrine, and the Protection of In-stream Flows*, 1986 U. ILL. L. REV. 407, 409-411 (1986); Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U. L. REV. 511, 549-68 (1975).

16. Stephen A. DeLeo, Note, *Phillips Petroleum Co. v. Mississippi and the Public Trust Doctrine: Strengthening Sovereign Interest in Tidal Property*, 38 CATH. U. L. REV. 571, 585 (1989); Melissa A. Heath, Note, *A Tidelands Trust for Georgia*, 17 GA. L. REV. 851, 866 (1983).

17. See generally Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

18. See, e.g., *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 472 (1988); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 362 (N.J.), cert. denied, 469 U.S. 821 (1984); *State v. Zimring*, 566 P.2d 725, 735 (Haw. 1977); *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971).

19. Thomas J. Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C. L. REV. 1, 16-17 (1972); Bertram C. Frey, Note, *The Public Trust in Public Waterways*, 7 URB. L. ANN. 219, 226 (1974).

20. *Marks v. Whitney*, 491 P.2d 374, 380-81 (Cal. 1971) (owner who acquired tidelands from state not automatically entitled to dredge and fill property).

21. See, e.g., *Board of Trustees of the Internal Improvement Trust Fund v. Madeira Beach Nominee, Inc.*, 272 So. 2d 209, 214 (Fla. Dist. Ct. App. 1973); *Hollan v. State*, 308 S.W.2d 122, 125 (Tex. Civ. App. 1958).

22. See, e.g., *Butler v. Attorney Gen.*, 80 N.E. 688, 689 (Mass. 1907).

23. This is known as the doctrine of accretion. A related concept, the doctrine of reliction, increases the property of the littoral owner when the water permanently uncovers a portion of the seabed, leaving it dry. Carol E. Dinkins, *Texas Seashore Boundary Law: The Effect of Natural and Artificial Modifications*, 10 Hous. L. REV. 43, 46 (1972).

24. See id. at 50. However, the doctrines of accretion, reliction and erosion only apply when the shoreline changes are "gradual and imperceptible." See *County of St. Clair v. Lovingston*, 90 U.S. 46, 68 (1874). Thus, the original boundary remains as it was when the

In recent years, certain activist courts attempted to redefine property interests to enhance the rights of the public at the expense of private landowners.²⁵ One aspect of this trend is the expansion of such concepts as prescription, implied dedication, customary rights and the public trust doctrine for the purpose of increasing public access to privately-owned portions of shoreline.²⁶

A number of courts use prescription to extend public access to dry-sand beaches. A prescriptive right requires the claimant to exercise actual, continuous, uninterrupted, adverse use over the property under a claim of right for fixed period of time.²⁷ In *Moody v. White*,²⁸ for example, the court found that the public acquired a prescriptive right since members of the public appropriated the dry-sand beach as their own by using it for hunting, fishing, swimming, boating, sunning, and other recreational purposes.²⁹

Other courts rely on the doctrine of implied dedication to provide public access to privately-owned beaches.³⁰ A dedication is express when it is made by oral declaration or written instrument.³¹ A dedication is implied when the intention to dedicate is inferred from the acts

shoreline is shifted suddenly by severe storms or hurricanes. Maloney & Ausness, *supra* note 12, at 226. Furthermore, in many states, legal boundaries do not change if the physical shoreline is altered by artificial structures. Mary C. Whitney, Comment, *The Federal Rule of Accretion and California Coastal Protection*, 48 S. CAL. L. REV. 1457, 1462-63 (1975).

25. *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 339, 342 (Fla. 1986), *cert. denied*, 479 U.S. 1065 (1987) (public trust doctrine invoked to invalidate sovereignty lands mistakenly conveyed into private ownership during nineteenth century as swamp and overflowed lands); *National Audubon Soc'y v. Superior Ct.*, 658 P.2d 709, 721 (Cal.), *cert. denied*, 464 U.S. 977 (1983) (existing appropriative water rights in nonnavigable tributaries can be restricted under public trust doctrine to prevent harm to navigable freshwater lake); *State v. McIlroy*, 595 S.W.2d 659, 664-65 (Ark.), *cert. denied*, 449 U.S. 843 (1980) (owners of freshwater streams subject to public rights under newly promulgated "recreational test" of navigability); *County of Haw. v. Sotomura*, 517 P.2d 57 (Haw. 1973) (extending public ownership of beaches from high water line to farthest reach of the waves); *McBryde Sugar Co. v. Robinson*, 517 P.2d 26 (Haw.), *cert. denied*, 417 U.S. 976 (1973) (changing state riparian rights doctrine); *Just v. Marinette County*, 201 N.W.2d 761, 769 (Wis. 1972) (lands adjacent to navigable waters are subject to special regulation under the public trust doctrine).

26. In theory, public rights extend only to the wet-sand beach below the mean high water line. See Frank E. Maloney, et al., *Public Beach Access: A Guaranteed Place to Spread Your Towel*, 29 U. FLA. L. REV. 853, 855 (1977). However, if members of the public are completely excluded from dry-sand areas, they may be prevented from using the wet-sand areas as well because of the existence of natural or manmade barriers. See Steve A. McKeon, Note, *Public Access to Beaches*, 22 STAN. L. REV. 564, 566 (1970).

27. Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627, 631 (1989). Because members of the public often share a beach with the littoral owner, the adversity requirement, if strictly enforced, may defeat a claim of prescriptive right. See Maloney, *supra* note 26, at 859. See also *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 76-77 (Fla. 1974) (public's use was permissive because littoral owner allowed members of the public onto beach to induce them to use its commercial pier facilities).

28. 593 S.W.2d 372 (Tex. Civ. App. 1979).

29. *Id.* at 374.

30. *Gion v. City of Santa Cruz*, 465 P.2d 50, 59 (Cal. 1970); *Seaway Co. v. Attorney General*, 375 S.W.2d 923, 940 (Tex. Civ. App. 1964).

31. Note, *Public Access to Beaches: Common Law Doctrines and Constitutional Challenges*, 48 N.Y.U. L. REV. 369, 370 (1973).

and conduct of the landowner.³² Thus, continuous, uninterrupted use of a parcel of land by the members of the public may give rise to an inference that the owner intended to dedicate the land to public use.³³ *Seaway Company v. Attorney General*³⁴ illustrates the application of this principle to shoreline areas. In that case, the court found the general public used the beach for more than a hundred years without permission or interference from littoral owners.³⁵ This was sufficient for the court to conclude that Seaway impliedly dedicated its property to the public for recreational purposes.³⁶

Some courts uphold public claims to the dry sand beach based on the ancient doctrine³⁷ of customary rights.³⁸ To qualify as a customary use, a public use must be ancient, uninterrupted, peaceful, reasonable, certain of description, obligatory with respect to affected landowners, and not repugnant to or inconsistent with other customs or law.³⁹ Until recently, state courts overwhelmingly refused to recognize the doctrine of customary rights as a part of American law.⁴⁰ However, in *State ex rel.*

32. Margit Livingston, *Public Access to Virginia's Tidelands: A Framework for Analysis of Implied Dedications and Public Prescriptive Rights*, 24 WM. & MARY L. REV. 669, 684 (1983).

33. See Alice G. Carmichael, Comment, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches*, 64 N.C. L. REV. 159, 168-9 (1985). Once an implied offer to dedicate is made and accepted, the owner cannot revoke the offer. McKeon, *supra* note 26, at 573. Furthermore, the public cannot lose its rights through nonuse or adverse possession. Luise Welby, Note, *Public Access to Private Beaches: A Tidal Necessity*, 6 UCLA J. ENVTL. L. & POL'Y 69, 78 (1986).

34. 375 S.W.2d 923 (Tex. Civ. App. 1964).

35. *Id.* at 933-34.

36. *Id.* at 940. California has also applied the doctrine of implied dedication to beaches. *Gion v. City of Santa Cruz*, 465 P.2d 50 (Cal. 1970). In *Gion*, the court declared that an intent to dedicate could be implied from adverse use as well as by acquiescence on the part of the littoral owner. *Id.* at 55. According to the *Gion* court, evidence that the beach has been used as if it were a "public recreation area" for the five-year prescriptive period was sufficient to support a finding of adverse use. *Id.* at 56. Furthermore, the court disagreed that public use of the beach was presumptively permissive. Instead the court required the landowner to prove that the use was pursuant to a license or that the landowner had made a bona fide effort to prevent the public from using the property. *Id.* at 57.

37. The doctrine of customary rights originated in England, where by immemorial custom, residents of towns and manors exercised certain use rights over private land. See Lew E. Delo, Note, *The English Doctrine of Custom in Oregon Property Law: State ex rel. Thornton v. Hay*, 4 ENVTL. L. 383, 389 (1974); David R. Miller, Comment, *Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches*, 25 U. FLA. L. REV. 586, 591 (1973).

38. *United States v. St. Thomas Beach Resorts, Inc.*, 386 F. Supp. 769 (D.V.I. 1974), *aff'd*, 529 F.2d 513 (3d Cir. 1975); *Matcha v. Mattox*, 711 S.W.2d 95, 98 (Tex. Ct. App. 1986), *cert. denied*, 481 U.S. 1024 (1987); *City of Daytona Beach v. Tona-Rama, Inc.*, 271 So. 2d 765 (Fla. Dist. Ct. App. 1972), *rev'd in part*, 294 So. 2d 73 (Fla. 1974); *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969); *In re Ashford*, 440 P.2d 76 (Haw. 1968). However, a number of states have refused to apply the doctrine of customary rights to beaches. *E.g.*, *Bell v. Town of Wells*, 557 A.2d 168, 179 (Me. 1989); *Leabo v. Leninski*, 438 A.2d 1153, 1156-57 (Conn. 1981); *Smith v. Bruce*, 244 S.E.2d 559, 569 (Ga. 1978); *Department and Council of Natural Resources v. Mayor of Ocean City*, 332 A.2d 630, 638 (Md. 1975); *Gilies v. Orienta Beach Club*, 289 N.Y.S. 733 (N.Y. Sup. Ct. 1935), *aff'd*, 288 N.Y.S. 136 (N.Y. App. Div. 1936).

39. See *Hay*, 462 P.2d at 677; Alfred Clayton, Jr., Note, *Oregon's "New" Doctrine of Custom*: McDonald v. Halvorson, 26 WILLAMETTE L. REV. 787, 792 (1990); Susan P. Stephens, *Access to the Shore: A Coast to Coast Problem*, 3 J. LAND USE & ENVTL. L. 95, 112-13 (1987).

40. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 717 (1986).

Thornton v. Hay,⁴¹ the Oregon Supreme Court approved the doctrine of customary rights and upheld a ban on fences and other barriers across the dry-sand portion of the beach.⁴²

Finally, a few courts invoke the public trust doctrine to protect public access to the dry sand beach. Most of these decisions involve nonresident access to municipally-owned beaches.⁴³ New Jersey, however, extends this principle of nondiscrimination to private beaches as well.⁴⁴

As the foregoing discussion demonstrates, both the forces of nature and activist courts threaten the use and enjoyment of private property in coastal areas. Landowners learned to live with the dramatic consequences of floods and hurricanes, as well as the more subtle losses of beach erosion. But now, in addition to the physical alteration of beachfront areas by natural forces, shorefront landowners are increasingly threatened by judicial attacks on property rights. Additionally, as shown in the next section, property owners are also threatened in some states by legislation that greatly restricts the right to build in shoreline areas.

B. *Regulation of Shoreline Development.*

Due to aesthetic and recreational values, the nation's coastal areas are prime targets for residential and commercial development.⁴⁵ How-

41. 462 P.2d 671 (Or. 1969).

42. The court observed the public had peacefully used the dry-sand beaches and foreshore since the beginning of the state's political history and that this use had never been interrupted by littoral landowners. Moreover, the public had always made use of the land in a manner appropriate to the land and to the usages of the community. The scope of this public right was visibly delimited by the physical boundaries of the dry-sand beach and by the character of the land. The evidence also showed that the dry-sand beach in question had been used, as of right, uniformly with similarly situated lands elsewhere. Therefore, allowance of public use of the dry-sand beach was not left to the option of individual landowners. Finally, the court concluded that public use of the dry-sand beaches of the state violated no law and was not inconsistent with any other customs. Accordingly, the court held that the public had acquired a customary right to use the dry-sand beach for recreational purposes. *Id.* at 676-678. *But see* McDonald v. Halvorson, 780 P.2d 714 (Or. 1989) (holding that customary rights do not necessarily extend to all beaches in the state).

43. *See, e.g.,* Van Ness v. Borough of Deal, 393 A.2d 571 (N.J. 1978); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972); Gewirtz v. City of Long Beach, 330 N.Y.S.2d 495 (N.Y. Sup. Ct. 1972).

44. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J.), *cert. denied*, 469 U.S. 821 (1984). In *Matthews*, a group of individuals sought to compel the Bay Head Improvement Association, a private nonprofit organization, to open its beachfront property to the general public. The trial court held in favor of the Association and this decision was affirmed by an intermediate appellate court. *Id.* at 358. The Association maintained its beachfront property for the benefit of its members during the summer months. Membership was generally restricted to Bay Head. *Id.* at 359.

On appeal, the New Jersey Supreme Court stated that the public trust doctrine protected recreational uses as well as fishing and navigation. *Id.* at 363. The court declared that the public had to have some rights in the dry-sand beach in order to exercise its rights to the foreshore. *Id.* at 364. According to the court, this rationale applied to private, as well as municipally-owned beaches. *Id.* at 365. Furthermore, not only must the public be allowed to travel across privately-owned beaches in order to reach the foreshore, but it must be allowed to use these beaches for recreational purposes as well. *Id.* In this case, the court ruled that the general public should be allowed to join the Association, regardless of whether they were residents of Bay Head or not. *Id.* at 368-69.

45. *See* David Owens, *Land Acquisition and Coastal Resource Management: A Pragmatic Perspective*, 24 WM. & MARY L. REV. 625, 625 n.3 (1983).

ever, uncontrolled development can cause a great deal of harm to the coastal environment. Erosion now occurs in almost every coastal area.⁴⁶ Although some of the erosion is natural,⁴⁷ much of it is caused by improper placement of artificial structures.⁴⁸ Furthermore, development near estuarine areas often threatens delicate marine habitats.⁴⁹ Finally, development on barrier islands often destroys sand dunes and thereby increases the risk of storm damage.⁵⁰

Encouraged by grants from the federal government,⁵¹ virtually every coastal state enacted legislation to protect the shoreline environment.⁵² A number of states established construction setback lines in

46. *Id.* at 626. Over the past 100 years, the Atlantic coast has receded an average of two to three feet per year, while the Gulf shoreline has receded an average of four to five feet per year. Erosion also occurs on a smaller scale on the West Coast. See Dennis J. Hwang, *Shoreline Setback Regulations and the Takings Analysis*, 13 U. HAW. L. REV. 1, 2 (1991).

47. The movement of sand and sediment can profoundly affect the shoreline. Under natural conditions, sand and gravel eroding from rocks and soils inland are carried downstream by rivers and streams. These particles ultimately reach the shoreline where they are deposited as beach sand. Michael A. Corfield, Comment, *Sand Rights: Using California's Public Trust Doctrine to Protect Against Coastal Erosion*, 24 SAN DIEGO L. REV. 727, 731 (1987). Littoral currents remove this sand from where it has been originally deposited and transport it to another beach or out to sea. Frank E. Maloney & Anthony J. O'Donnell, Jr., *Drawing the Line at the Oceanfront: The Role of Coastal Construction Setback Lines in Regulating Development of the Coastal Zone*, 30 U. FLA. L. REV. 383, 390 (1978).

48. Artificial structures can interfere with the movement of sand and sediment and cause erosion. For example, structures, such as groins and jetties, that extend out perpendicularly into the water, contribute to beach erosion by interrupting the flow of sand along the shoreline. Zalkin, *supra* note 6, at 214. In addition, seawalls and other vertical structures change the shoreline's natural slope and absorb the full force of the waves. This causes a turbulent, scouring action at the base of the structure that accelerates the removal of sand from the surrounding area. Maloney & O'Donnell, *supra* note 47, at 390. Finally, improved inlets increase erosion by causing sand to pile up on the updrift side of the shore and blocking it from the downdrift side. FRANK E. MALONEY ET AL., WATER LAW AND ADMINISTRATION—THE FLORIDA EXPERIENCE § 93.1 (1968).

49. Ausness, *supra* note 13, at 392; David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311, 339-40 (1988); Kenneth W. Parsons, Note, *Environmental Law—Preservation of the Estuarine Zone*, 49 N.C. L. REV. 964, 970 (1971).

50. Zalkin, *supra* note 6, at 213-14.

51. The Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (1988), is the primary source of federal funding for state shoreline regulation activities. This statute authorizes grants to states that develop and implement a coastal management program that satisfies certain statutory requirements. *Id.* § 1454(a) (development grants); *id.* § 1455(a) (administrative grants). For a further discussion of the Coastal Zone Management Act, see generally Sarah Chasis, *The Coastal Zone Management Act: A Protective Mandate*, 25 NAT. RES. J. 21 (1985); Daniel R. Mandelker & Thea A. Sherry, *The National Coastal Zone Management Act of 1972*, 7 URB. L. ANN. 119 (1974); Ronald J. Rychlak, *Coastal Zone Management and the Search for Integration*, 40 DEPAUL L. REV. 981, 984-90 (1991).

52. See ALA. CODE §§ 9-7-10 to 9-7-20 (1987); ALASKA STAT. §§ 46.40.10 to 46.40.210 (1992) (The Alaska Coastal Management Program); CAL. PUB. RES. CODE §§ 30000 to 30900 (West 1986 & Supp. 1992) (The California Coastal Act of 1976); CONN. GEN. STAT. ANN. §§ 22a-90 to 22a-113j (West 1958 & Supp. 1992) (The Coastal Management Act); DEL. CODE ANN. tit. 7, §§ 7001-7013 (1991) (The Coastal Zone Act); FLA. STAT. ANN. §§ 161.052-161.200 (West 1990 & Supp. 1992) (The Beach and Shore Preservation Act); GA. CODE ANN. §§ 12-5-210 to 12-5-312 (Michie 1988) (The Shore Protection Act); HAW. REV. STAT. §§ 205A-1 to 205A-49 (1985 & Supp. 1991) (Hawaii Coastal Zone Management Act); LA. REV. STAT. ANN. §§ 49:213.1-49:214.41 (West Supp. 1992) (Louisiana Coastal Wetlands Conservation, Restoration, and Management Act); ME. REV. STAT. ANN. tit. 38, §§ 480A to 490 (1964 & Supp. 1991); MD. NAT. RES. CODE ANN. §§ 9-101 to 9-603 (1990 & Supp. 1992); MASS. GEN. LAWS ANN. ch. 21A, § 4A (West Supp. 1988); MISS.

coastal areas in order to control development and protect against coastal erosion.⁵³ Most of these states require new structures to be placed a certain distance from a fixed line, such as a vegetation line, dune line, or mean high water line.⁵⁴ Other states, however, employ a floating setback line.⁵⁵ Unlike a fixed setback line that is uniform along the entire coastline, a floating setback line will vary according to the historical rate of erosion in a particular area.⁵⁶ The purpose of this regulatory technique is to ensure that buildings are located far enough inland to have a reasonable lifespan before being threatened by erosion.⁵⁷ Unfortunately, as *Lucas* illustrates, floating setback lines often impose excessive burdens on the owners of shorefront property.

II. THE LAW OF REGULATORY TAKINGS.

Perhaps because of its complexity, the takings issue has intrigued generations of legal scholars, inspiring them to write numerous articles on the subject.⁵⁸ This Article does not try to improve upon these efforts, but instead merely provides a brief overview, with special emphasis on those aspects of takings law involved in the *Lucas* case.

A. The Police Power.

States, through the exercise of their police power, may regulate the

CODE ANN. §§ 49-27-1 to 49-27-69 (1990) (The Coastal Wetlands Protection Act); N.J. STAT. ANN. §§ 13:19-1 to 13:19-21 (West 1991) (The Coastal Area Facility Review Act); N.Y. ENVTL. CONSERV. LAW §§ 34-0101 to 34-0113 (McKinney 1984 & Supp. 1992) (Coastal Erosion Hazard Areas); N.C. GEN. STAT. §§ 113A-100 to 113A-134.3 (1990 & Supp. 1991) (North Carolina Environmental Policy Act of 1971); OR. REV. STAT. §§ 196.405 to 196.515 (1989); R.I. GEN. LAWS §§ 46-23-1 to 46-23-21 (1991); S.C. CODE ANN. §§ 48-39-10 to 48-39-360 (Law. Co-op 1986 & Supp. 1991) (The Beachfront Management Act of 1988); TEX. NAT. RES. CODE ANN. §§ 33.001 to 33.176 (West 1992) (The Coastal Public Lands Management Act of 1973); VA. CODE ANN. §§ 28.1-101.4 (Supp. 1989); WASH. REV. CODE ANN. §§ 43.51.650 to 43.51.765 (West 1989 & Supp. 1992).

53. Hwang, *supra* note 46, at 5.

54. ALA. CODE § 9-7-10 (1987); DEL. CODE ANN. tit. 7, § 7004 (1991); HAW. REV. STAT. § 205A-43(a) (Supp. 1991); ME. REV. STAT. ANN. tit. 38, § 438A(1) (1989 & Supp. 1991).

55. FLA. STAT. ANN. § 161.053 (West 1988 & Supp. 1992) (100-year storm surge setback line); N.J. STAT. ANN. § 13:9A-5 (West 1991); N.Y. ENVTL. CONSERV. LAW § 34-0103(3)(a) (McKinney 1984) (setback line calculated at 40 times annual erosion rate); N.C. GEN. STAT. § 113A-118 (1991); S.C. CODE ANN. § 48-39-290(B)(4) (Law. Co-op Supp. 1991) (setback line calculated at 40 times annual erosion rate).

56. The floating setback line is determined by calculating the annual rate of erosion, based on historical data. This figure is then multiplied by a factor of 30 to 100 as determined by the statute. Hwang, *supra* note 46, at 9.

57. *Id.* at 3-4.

58. See generally BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); RICHARD EPSTEIN, *TAKINGS—PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752 (1988); Lawrence Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1974); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299 (1989); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

use of private property in order to promote the health, safety, morals or general welfare of their citizens.⁵⁹ These governmental regulations must, however, meet the requirements of substantive due process.⁶⁰ The "rational basis" test is the prevailing approach for reviewing due process challenges.⁶¹ This test considers whether the regulation advances any valid governmental interest⁶² and whether the means chosen provides a rational method for accomplishing this purpose.⁶³ Traditionally, the Court accords a great deal of deference to legislative judgments regarding regulatory means and ends.⁶⁴ However, even if a regulation satisfies the requirements of the due process clause, it may still violate the takings clause⁶⁵ if it takes property without just compensation.⁶⁶ If the regulation is deemed to be a taking, the government must either abandon the regulation or compensate the injured party.⁶⁷

B. Traditional Takings Tests.

1. The Physical Invasion Test.

The physical invasion test requires the government to pay compensation when it permanently occupies private property.⁶⁸ This rule uses objective criteria and, therefore, is relatively predictable and consistent.⁶⁹ However, the physical invasion test only has limited applicability and, therefore, it rarely serves as a deciding test in regulatory taking

59. Robert I. McMurry, Comment, *Just Compensation or Just Invalidity: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L. REV. 711, 712 (1982).

60. The due process clause of the fifth amendment provides that no person shall be deprived of property without due process of law. U.S. CONST. amend. V.

61. Denis Binder, *Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLA. L. REV. 1, 6 (1972).

62. See *Chicago B. & Q. Ry. v. Ill. ex rel. Drainage Comm'rs*, 200 U.S. 561, 592 (1906); *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

63. See *Lawton v. Steele*, 152 U.S. 133, 137 (1894); *Minnesota v. Barber*, 136 U.S. 313, 320 (1890); *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888).

64. E. George Rudolph, *Let's Hear It for Due Process—An Up to Date Primer on Regulatory Takings*, 23 LAND & WATER L. REV. 355, 374 (1988).

65. The takings or just compensation clause of the fifth amendment provides that private property may not be taken for public use without payment of just compensation. U.S. CONST. amend. V. The takings clause is binding on the states through the application of fourteenth amendment. See *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 310 n.4 (1987), cert. denied, 493 U.S. 1056 (1990); *Webb's Famous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980); *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911); *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 241 (1897).

66. In theory, the due process clause and the takings clause are concerned with entirely different issues. However, some commentators suggest that these provisions cannot be entirely separated. John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465, 485-86 (1983); James L. Oakes, "Property Rights" in *Constitutional Analysis Today*, 56 WASH. L. REV. 583, 592 (1981).

67. See *First English Evangelical Lutheran Church*, 482 U.S. at 321.

68. See *United States v. Dickinson*, 331 U.S. 745, 750 (1947) (dam raised water level, causing flooding of plaintiff's land); *United States v. Lynah*, 188 U.S. 445, 469 (1903) (overflow from navigation project turned plaintiff's rice plantation into a bog); *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 181 (1872) (state authorized dam on river caused upstream lake to overflow its banks and flood plaintiff's land).

69. Neal S. Manne, Note, *Reexamining the Supreme Court's View of the Taking Clause*, 58 TEX. L. REV. 1447, 1465 (1980).

cases.⁷⁰ Furthermore, the test is arguably unfair because it compensates trivial losses,⁷¹ while denying compensation for substantial losses when no physical invasion occurs, even when the landowner's loss is more severe.⁷²

2. The "Noxious Use" Test.

The "noxious use" test allows states to regulate, without paying compensation, activities that create a risk of significant harm to the public regardless of the economic effect on the regulated parties.⁷³ In effect, this rule vindicates the right of the government to protect the public against harmful spillover effects from private activity.⁷⁴ The justification usually given for the denial of compensation is that no one can obtain a vested right to injure or endanger the public; therefore, the abatement of a noxious use is not a taking of property.⁷⁵ The noxious rule is generally applied to nuisances or "nuisance like" activities.⁷⁶ It works tolerably well in these circumstances, but provides little help in resolving conflicts among socially desirable, but incompatible, activities.⁷⁷

3. The Harm/Benefit Test.

The harm/benefit rule was derived from the noxious use rule.⁷⁸ Under this approach, no taking occurs if the government regulates to prevent a landowner from causing harm to others. However, a taking occurs if the purpose of the regulation is to force the landowner to con-

70. Binder, *supra* note 61, at 3.

71. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). For a brief description of the *Loretto* decision, see *infra* nn. 101-103 and accompanying text.

72. See John A. Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 *RUTGERS L. REV.* 243, 252 (1982).

73. See, e.g., *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (upholding law that required destruction of cedar trees infected with cedar rust parasites); *Samuels v. McCurdy*, 267 U.S. 188, 195-96 (1925) (upholding law prohibiting possession in plaintiff's home of alcoholic beverages purchased before passage of state prohibition law); *Pierce Oil Corp. v. City of Hope*, 248 U.S. 498, 499 (1919) (upholding ban on oil and gasoline storage tanks near residential dwellings); *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (upholding prohibition of brickyard in residential area); *Reinman v. City of Little Rock*, 237 U.S. 171, 177 (1915) (upholding ban on livery stables in residential area); *Murphy v. California*, 225 U.S. 623, 629 (1912) (upholding ordinance against pool halls); *L'Hote v. New Orleans*, 177 U.S. 587, 598 (1900) (upholding ban on houses of prostitution in certain areas); *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) (upholding closure of plaintiff's brewery).

74. See Ross B. Lipsker & Rebecca L. Heldt, *Regulatory Takings: A Contract Approach*, 16 *FORDHAM URB. L.J.* 195, 211 (1988).

75. *Gardner v. Michigan*, 199 U.S. 325, 330 (1905); *New Orleans Gas Light Co. v. Drainage Comm'n*, 197 U.S. 453, 462 (1905).

76. See Andrea L. Peterson, *The Taking Clause: In Search of Underlying Principles, Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 *CAL. L. REV.* 55, 86 (1990) (suggesting that the noxious use rule allows confiscatory regulation without compensation only if the public would regard the regulated activity as "wrongful").

77. Sax, *supra* note 58, at 48-50. In addition, the noxious use rule is arguably unfair in cases where the landowner could not reasonably foresee that a particular use might subsequently become harmful to the public. Berger, *supra* note 58, at 174-75.

78. Hunter, *supra* note 49, at 323-24. The harm/benefit test was first devised by Professor ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* § 511 at 546 (1904).

fer a benefit on the public.⁷⁹ The Supreme Court does not treat the harm/benefit approach as a distinct test.⁸⁰ However, state courts frequently rely on this test to uphold land-use controls in environmentally sensitive areas.⁸¹

In theory, there is a significant difference between preventing a harm and securing a benefit.⁸² However, in practice, it is often difficult to maintain this distinction on a principled basis.⁸³ In addition, critics of the rule charge that the concept of harm can be expanded to cover just about anything.⁸⁴

4. The Diminution-in-Value Test.

Under the diminution-in-value test, a regulation that reduces the value of property beyond a certain point is treated as a taking.⁸⁵ *Pennsylvania Coal Co. v. Mahon*⁸⁶ is commonly thought to be the original source of this doctrine.⁸⁷ In that case, a coal company challenged the validity of a statute prohibiting the mining of anthracite coal if the mining caused subsidence of overlying residential property. Writing for the Court, Justice Holmes declared that while some diminution in value is permissible, "[w]hen it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."⁸⁸

79. Allison Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 665-66 (1958); Lipsker & Heldt, *supra* note 74, at 211. According to Professor Michelman, the rationale of the harm/benefit rule "is that compensation is required when the public helps itself to good at private expense, but not when the public simply requires one of its members to stop making a nuisance of himself." Michelman, *supra* note 58, at 1196.

80. *But see* Justice Rehnquist's dissent in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138-39 (1978).

81. *See, e.g.*, *Graham v. Estuary Prop. Inc.*, 399 So. 2d 1374, 1381 (Fla. 1981) (upholding a ban on destruction of mangrove forest); *Claridge v. New Hampshire Wetlands Bd.*, 485 A.2d 287, 292 (N.H. 1984) (upholding denial of permission to fill wetlands); *Carter v. South Carolina Coastal Council*, 314 S.E.2d 327, 329 (S.C. 1984) (upholding a prohibition on filling in tidal wetlands); *Orion Corp. v. State*, 747 P.2d 1062, 1081 (Wash. 1987) (upholding a prohibition on filling privately-owned tideland areas); *Just v. Marinette County*, 201 N.W.2d 761, 767-68 (Wis. 1972) (upholding prohibition on filling along the shore of a navigable lake).

82. Dunham, *supra* note 79, at 664-65.

83. Catherine R. Connors, *Back to the Future: The "Nuisance Exception" to the Just Compensation Clause*, 19 CAP. U. L. REV. 139, 184 (1990). In the majority opinion of *Lucas*, Justice Scalia also recognizes that the difference between benefit and harm may be only a matter of perception. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897-98 (1992).

84. Sondra E. Berchin, Comment, *Regulation of Land Use: From Magna Carta to a Just Formulation*, 23 UCLA L. REV. 904, 911 (1976).

85. Donald W. Large, *This Land Is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039, 1056 (1973).

86. 260 U.S. 393 (1922).

87. Peterson, *supra* note 58, at 1325. It appears that Justice Holmes mentioned diminution-in-value on several occasions prior to the decision in *Pennsylvania Coal*. *See, e.g.*, *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (if an exercise of police power renders property "wholly useless, the rights of property would prevail over the other public interest, and the police power would fail"); *Interstate Consol. St. Ry. Co. v. Massachusetts*, 207 U.S. 79, 87 (1907) ("the question narrows itself to the magnitude of the burden imposed").

88. 260 U.S. at 413. Applying this principle, Holmes concluded that the statute made

In applying the diminution-in-value test to determine whether compensation must be paid, the Court looks to the extent of economic loss suffered by the property owner.⁸⁹ This involves determination of a numerator and a denominator — that is, the value to the property before and the value after the regulation is applied.⁹⁰ The Court must then calculate the percentage of the decline in value and decide whether the decline is sufficient to constitute a taking.⁹¹

There are a number of difficulties with the diminution-in-value test. In the first place, it is not clear whether excessive diminution in value alone constitutes a taking or whether it is merely one factor for the Court to consider in deciding takings controversies.⁹² Moreover, the diminution-in-value test provides no standard by which to determine how much of a diminution is a taking.⁹³ Finally, the rule does not identify which property interests must be taken into account when calculating a regulation's economic effect.⁹⁴

C. *Modern Takings Tests.*

Each of the traditional takings tests focuses on a single factor, such as the physical consequences of the government's action, the motivation behind the challenged regulation, or its economic impact on the claimant's property. In the last decade or so, the Court has tended to employ takings tests that require more than one factor to be considered. The two most popular approaches are the *Penn Central* balancing test and the *Agins* two-factor test.

1. *The Penn Central Balancing Test.*

This test made its debut in *Penn Central Transp. Co. v. New York City*.⁹⁵ The *Penn Central* case arose out of the refusal of the New York City Landmarks Preservation Commission to allow Penn Central to construct a multi-story office building over Grand Central Station Terminal (the Terminal).⁹⁶ Penn Central claimed that the New York Landmarks Preservation Law deprived it of all gainful use of the airspace above the Terminal. The Court considered the following factors to determine

it unprofitable to remove coal from the land in question, and thus destroyed the value of the company's mineral estate. This, in his view, constituted a taking. *Id.* at 414.

89. Susan J. Krueger, Comment, *Keystone Bituminous Coal Ass'n v. DeBenedictis: Toward Redefining Takings Law*, 64 N.Y.U. L. REV. 877, 879 (1989).

90. Donald W. Large, *The Supreme Court and the Takings Clause: The Search for a Better Rule*, 18 ENVTL. L. 3, 19 (1987); Michelman, *supra* note 58, at 1229-34.

91. *Id.* at 19-20.

92. Peterson, *supra* note 58, at 1327.

93. Craig A. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335, 339 (1988); Rose, *supra* note 58, at 566.

94. Michelman, *supra* note 58, at 1192-93; David A. Myers, *Some Observations on the Analysis of Regulatory Takings in the Rehnquist Court*, 23 VAL. U. L. REV. 527, 541 (1989).

95. 438 U.S. 104 (1978).

96. Under this law, any change in the exterior structure of a building designated as a historic landmark required a permit from the Landmarks Preservation Commission. In 1967, the Commission classified Grand Central Station Terminal, which was owned by Penn Central, as a historic landmark. *Id.* at 115-17.

whether a taking occurred: (1) the character of the governmental action involved; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the economic impact of the regulation upon the property owner.⁹⁷ Applying these factors to the facts of the case, the Court upheld the New York law.⁹⁸

a. *Character of Governmental Action.*

This factor involves both the "type of taking" alleged and the "nature of the state action." The "type of taking" inquiry looks to whether the government action is a physical invasion or whether it is an accepted form of economic regulation.⁹⁹ The "nature of state action" analysis focuses on the justification for the government's action, and in particular, on whether it is attempting to prevent harm to the public.¹⁰⁰

i. The "Type of Taking."

The Court focused almost entirely on the "type of taking" in *Loretto v. Teleprompter Manhattan CATV Corp.*¹⁰¹ The Court struck down a New York statute that required landlords to permit cable television companies to install cable facilities on their property upon payment of a nominal fee.¹⁰² The Court characterized this relatively trivial intrusion as a property restriction of unusually serious character.¹⁰³

The "type of taking" also influenced the Court's decision in *Kaiser Aetna v. United States*,¹⁰⁴ a case which involved public access to a nonnavigable pond. The landowner, with the permission of the United States Army Corps of Engineers (the Corps of Engineers), connected one end of the pond with the ocean and constructed a marina at the other end. Later, the Corps of Engineers sought to compel the landowner to allow members of the public to use the pond and marina.¹⁰⁵ Although the Court acknowledged that the pond had become navigable for purposes of federal regulation, it refused to rule that the federal navigation servitude requires public access to private property without payment of compensation.¹⁰⁶

97. *Id.* at 124.

98. *Id.* at 138.

99. Thomas A. Hippler, Comment, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle of Rights" from Mugler to Keystone Bituminous Coal*, 14 B.C. ENVTL. AFF. L. REV. 653, 713 (1987).

100. Peterson, *supra* note 58, at 1318-19.

101. 458 U.S. 419 (1982).

102. *Id.* at 441.

103. *Id.* at 426.

104. 444 U.S. 164 (1979).

105. *Id.* at 168.

106. *Id.* at 179-80. The navigation servitude doctrine provides that the federal government does not have to compensate landowners who are injured when it exercises its power over navigable waters under the Commerce Clause. See, e.g., *United States v. Grand River Dam Auth.*, 363 U.S. 229, 233 (1960) (federal government not required to pay owner of condemned property for water power rights); *United States v. Twin City Power Co.*, 350 U.S. 222, 228 (1956) (same); *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945) (federal government not required to pay owner of hydroelectric dam for reduction

ii. The "Nature of State Action."

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*¹⁰⁷ the Court looked at "the nature of state action" to determine if a taking occurred.¹⁰⁸ *Keystone* involved a state statute that prohibited mining which might cause subsidence to certain buildings. Regulations adopted pursuant to this statute required fifty percent of the coal beneath these structures to be kept in place to provide surface support.¹⁰⁹ The plaintiffs sought to enjoin state officials from enforcing the statute or its regulations.¹¹⁰ On appeal, the Court declared that the government had a substantial interest in preventing harm from nuisance-like activities and, therefore, the Court did not require compensation.¹¹¹ The Court upheld the statute in part by suggesting that mining operations that harmed the property of third parties were similar to noxious uses.¹¹² This case effectively incorporated the noxious use rule into the *Penn Central* balancing test.¹¹³

b. *Investment-Backed Expectations.*

Deprivation of "investment-backed expectations" may also constitute a regulatory taking.¹¹⁴ The rationale behind the protection of investment-backed expectations is similar to the reliance rationale that underlies the doctrines of estoppel and vested rights in zoning law.¹¹⁵ However, to claim interference with investment-backed expectations, the property owner must be able to point to specific facts and circumstances that make such expectations reasonable.¹¹⁶

The burden of proving the existence of investment-backed expectations is often a difficult one for property owners to meet. For example, the Court rejected the landowner's investment-backed expectations

in water flow caused by construction of flood control project); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 65-66 (1913) (federal government not required to pay owner of condemned dam for water power rights).

107. 480 U.S. 470 (1987). The Court seems to have also used the *Agin* two-factor test in *Keystone*. See Peterson, *supra* note 58, at 1329.

108. 480 U.S. at 488-90.

109. *Id.* at 476-77.

110. The trial court refused to grant the requested injunction. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 581 F. Supp. 511, 520 (W.D. Pa. 1984). This decision was affirmed by the court of appeals. *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707, 719-20 (3d Cir. 1985).

111. 480 U.S. at 492.

112. *Id.*

113. See James S. Burling, *Property Rights, Endangered Species, Wetlands, and Other Critters—Is It Against Nature to Pay for a Taking?*, 27 LAND & WATER L. REV. 309, 343 (1992) (nuisance exception could be viewed as an element of the "character" of government action).

114. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Professor Frank Michelman appears to have coined this expression. See Michelman, *supra* note 58, at 1233 (a taking occurs when a claimant is deprived of "distinctly perceived, sharply crystallized, investment-backed" expectations).

115. Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3, 42 (1987). For a discussion of these concepts see John Martinez, *Reconstructing the Takings Doctrine by Redefining Property and Sovereignty*, 16 FORDHAM URB. L.J. 157, 181-82 (1988).

116. Richard G. Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 NOTRE DAME L. REV. 1, 41 (1989).

claim in the *Penn Central* case, concluding that its expectations largely focused around the Terminal's traditional use as a railroad station. Since the law only restricted a use of the airspace, the Court felt that it did not frustrate Penn Central's expectations with respect to use of the Terminal.¹¹⁷ Conversely, the landowner in *Kaiser Aetna* persuaded the Court that by allowing the landowner to improve the pond, the Corps of Engineers created certain expectancies, including the expectancy that the landowner could continue to exclude the public from the pond and the marina.¹¹⁸

c. *Economic Impact.*

Obviously, the size of the burden imposed on a property owner by a regulation is relevant to the taking issue.¹¹⁹ At the same time, even a severe economic impact does not necessarily constitute a taking.¹²⁰ Moreover, the Court developed several techniques that undercut claims of adverse economic impact in taking issue cases. One concept is the doctrine of average reciprocity of advantage. The other is that the entire "bundle of rights" in a piece of property should be considered when measuring the economic impact in a takings analysis.

i. *Average Reciprocity of Advantage.*

"Average reciprocity of advantage" originally meant that the state was not required to pay just compensation when a party giving up property received a new benefit not shared by the general public.¹²¹ This rule implicitly assumed the regulation standing alone might be a taking, but the new benefit was payment in kind, rather than in cash, which satisfied the compensation requirement.¹²² This appears to be what happened in *Penn Central*, where the plaintiff claimed the Landmark Preservation Law only benefitted the general public. The Court acknowledged that the burden fell disproportionately on Penn Central, but nevertheless concluded that the fact that some benefit accrued to Penn Central was sufficient to compensate the landowner.¹²³ The current approach is to regard any general benefits that arise from the regu-

117. 438 U.S. at 136. See also *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (employers withdrawing funds from multi-employer pension plans required to provide adequate funding for vested pension benefits); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006-07 (1984) (health and safety data required to be submitted to EPA not protected against disclosure).

118. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

119. *Michelman*, *supra* note 58, at 1191; *Wilkins*, *supra* note 116, at 30.

120. *Krueger*, *supra* note 89, at 892.

121. *Connors*, *supra* note 83, at 173. The reciprocal advantage principle was traditionally invoked to justify special assessments.

122. *Richard A. Epstein, Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 21 (1988).

123. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 134-35 (1978). Justice Rehnquist, in a dissenting opinion, argued that the landowners did not receive any benefit from the law. *Id.* at 139-40. See also Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 485 (1983) (contending that there was no plausible reciprocity of advantage to the landowner in *Penn Central*).

lation as mitigating the economic harm it imposes on a particular property owner.¹²⁴

ii. Effect of the Regulation on the Entire Property Interest.

The Court generally insists that economic impact be assessed in terms of the entire property interest of the regulated party.¹²⁵ Nevertheless, property owners occasionally utilize a tactic known as "conceptual severance" to defeat this policy. This involves "severing" from the whole bundle of rights just those aspects of property use that are impaired by the regulation and then treating them as a separate property interest.¹²⁶

In *Penn Central*, for example, the landowner claimed that the Landmark Preservation Law deprived it of all gainful use of the airspace above the Terminal. Rejecting this attempt at conceptual separation, the Court declared that it must consider the economic impact of the law on Penn Central's entire "bundle of rights" in the Terminal and not restrict its inquiry to one particular aspect of these rights.¹²⁷

The plaintiffs in *Keystone* also employed a conceptual separation strategy. They contended that the coal that would have to be left in the ground was a separate property interest being taken by the state.¹²⁸ However, the Court rejected this argument by concluding that this coal did not constitute a separate property interest distinct from the plaintiffs' coal reserves as a whole.¹²⁹

2. The *Agin* Two Factor Test.

In *Agin v. City of Tiburon*,¹³⁰ the plaintiffs challenged the validity of

124. Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 351 (1990) (reciprocal advantages contribute to an economic mix effectively diluting the level of a regulation's impact).

125. See, e.g., *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety").

126. Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988).

127. *Penn Central*, 438 U.S. at 130-31. Furthermore, the Court observed, the Landmarks Preservation Law did not completely destroy the value of the airspace above the Terminal because it allowed Penn Central to transfer its "development rights" in the airspace to other nearby property that it owned. In the Court's view, this mitigated any loss that Penn Central might suffer if were denied all use of the airspace above the Terminal. *Id.* at 137.

128. *Keystone*, 480 U.S. at 496-97.

129. *Id.* at 498. Although, the plaintiffs would be required to leave 27 million tons of coal in place, this only amounted to about two percent of their total coal reserves of 1.46 billion tons. Furthermore, the plaintiffs conceded that no individual mine would be rendered unprofitable by the regulation. *Id.* at 496. The plaintiffs also argued that the statute destroyed a separate legal interest known as the "support estate." *Id.* at 496-97. However, the Court denied that the support estate was really a distinct property interest. According to the Court, the support estate had value only when it was used in connection with either the mineral estate or the surface estate. Therefore, the Court refused to conclude that the statute completely destroyed the support estate. *Id.* at 500-01.

130. 447 U.S. 255 (1980).

two local ordinances that limited the number of residential dwellings that could be constructed on their five-acre tract of land. The plaintiffs maintained that the city's density restrictions would make it economically impossible for them to develop their property.¹³¹ On appeal, the Court applied a two-part test to facial challenges to the land use control regulations. Under this approach, a taking would occur if either: (1) the regulation failed to substantially advance a legitimate state interest; or (2) if it deprived the landowner of all economically viable use of his or her property.¹³²

a. *Substantially Advance Legitimate Governmental Goals.*

The requirement that a regulation "substantially advance legitimate governmental goals" is traditionally associated with substantive due process. In *Agins*, however, the Court incorporated this principle into its takings analysis.¹³³ The Court concluded that Tiburon's ordinance substantially advanced legitimate governmental goals by protecting the public against the adverse effects of uncontrolled urbanization.¹³⁴ In *Nollan v. California Coastal Comm'n*,¹³⁵ however, the Court ruled that to "substantially advance" a legitimate state interest, a "reasonable nexus" must be established between the regulation and the public need it seeks to address.¹³⁶ Furthermore, satisfying this test requires close scrutiny of both the ends served by governmental action, as well as the means used to achieve them.¹³⁷

Some commentators suggest that "substantially advance" aspect of *Agins* is not only a "means-ends" test, but that it is also concerned with the nature of the state's interest.¹³⁸ Thus, the central consideration of this test is whether the state is attempting to prevent a substantial harm to the public. For example, in *Keystone*, the Court first asked if the statute served a legitimate public purpose,¹³⁹ and then considered whether the government was seeking to prevent a noxious use of the plaintiffs'

131. The California Supreme Court upheld the validity of the ordinance. *Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979).

132. 447 U.S. at 260.

133. See Norman Williams, Jr. et al., *The White River Junction Manifesto*, 9 VT. L. REV. 193, 213-14 (1984) (criticizing the Court for injecting substantive due process concepts into takings analysis).

134. 447 U.S. at 261.

135. 483 U.S. 825 (1987).

136. The plaintiffs in *Nollan* sought permission from the California Coastal Commission to build a house on a parcel of beachfront property. However, the Commission refused to issue the necessary permit unless the plaintiffs agreed to grant an public easement along the beach. The Commission claimed that an easement was necessary to protect the public's ability to see the beach, to overcome the "psychological barrier" created by a developed shorefront, and to prevent congestion on public beaches. The Court failed to see how the permit condition would achieve any of these objectives. *Id.* at 836.

137. Nathaniel S. Lawrence, *Means, Motives, and Takings: The Nexus Test of Nollan v. California Coastal Commission*, 12 HARV. ENVTL. L. REV. 231, 242-43 (1988); Wilkins, *supra* note 116, at 8.

138. See, e.g., Burling, *supra* note 113, at 343; Peterson, *supra* note 58, at 1328.

139. *Keystone*, 480 U.S. at 485-88.

property.¹⁴⁰ It is not clear, however, whether compensation would be required under this approach if the Court concluded the state was seeking to prevent a nuisance.

b. *Deprivation of All Economically Viable Use.*

Under the *Agins* formula, a regulation that substantially advances a legitimate state interest can still result in a taking if it deprives the claimant of all economically viable use of his property.¹⁴¹ It is not clear whether this language is to be taken literally or whether it is merely a restatement of the diminution-in-value principle. The Court never answered this question in *Agins* because it could not determine whether the plaintiffs had suffered any loss as a result of the ordinances.¹⁴² In subsequent cases where the issue has arisen, the Court never found that a regulation deprived a claimant of all economically viable use of his or her property.¹⁴³

D. A Critique of Current Takings Jurisprudence.

As many legal commentators observe, the Supreme Court's current takings jurisprudence leaves much to be desired.¹⁴⁴ First, the Court uses inconsistent approaches in takings cases. The *Penn Central* test balances various factors without (except perhaps in the case of a physical invasion) according preeminence to any one factor.¹⁴⁵ The *Agins* test, on the other hand, is an "all or nothing" approach where a taking exists if either element of the test is satisfied.¹⁴⁶ It has been suggested that the *Agins* approach is applicable to facial challenges, while the *Penn Central*

140. *Id.* at 488-90.

141. *Agins*, 447 U.S. at 260. The expression "no economically viable use" originated in a footnote in the *Penn Central* case. *Penn Central*, 438 U.S. 104, 138 n.36.

142. *Agins*, 447 U.S. at 262-63.

143. *See, e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985) (denial of permit to dredge and fill in wetlands area does not deny landowner all economically beneficial use of land).

144. *See, e.g.*, Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 2 (1971) ("With some exceptions, the decisional law [on the takings issue] is largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric."); Epstein, *supra* note 122, at 4 ("the cases continue to mount up, and the pressures to distinguish and to reconcile them increase, until this array of ad hoc decisions becomes wholly incomprehensible to legal and lay observer alike"); Humbach, *supra* note 72, at 244 ("the law of police-power takings is a widely acknowledged hodgepodge, its doctrines a farrago of fumbblings which have suffered too long from a surfeit of deficient theories."); Peterson, *supra* note 58, at 1303-04 ("the Court's takings doctrine is in far worse shape than has generally been recognized—indeed, . . . it is difficult to imagine a body of case law in greater doctrinal and conceptual disarray"); Rose, *supra* note 58, at 562 ("commentators propose test after test to define 'takings,' while courts continue to reach ad hoc determinations rather than principled resolutions"); William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1059 n.11 (1980) ("in truth, the collected decisions of the Supreme Court, and all other courts [on the takings issue], leave the subject as disheveled as a ragpicker's coat").

145. Peterson, *supra* note 58, at 1317.

146. *Id.* at 1329 n.152.

test is used where "as applied" challenges are involved.¹⁴⁷ However, the Court does not apply this distinction with any great degree of consistency. Consequently, it is difficult to predict what test the Court will apply in any given situation.¹⁴⁸

The *Penn Central* and *Agins* tests have also been criticized on indeterminacy grounds. Thus, it is claimed that the three factors in *Penn Central* provide little structure to the Court's taking analysis.¹⁴⁹ First, the Court defines each factor in a variety of ways without acknowledging shifts in definition.¹⁵⁰ Second, the weight assigned to each factor varies from case to case.¹⁵¹ The *Agins* test is subject to similar criticism. Both the "substantially advance" requirement¹⁵² and the "no economically viable use" concept have been criticized for lack of clarity.¹⁵³

To its credit, the Court appears to be gradually reducing the areas of ambiguity in its takings issue jurisprudence. Thus, for example, *Loretto* established a clear position with respect to permanent physical invasions of real property¹⁵⁴ and *Nollan* apparently tightened up the "means-ends" test.¹⁵⁵ In *Lucas*, the Court turned its attention to another area of ambiguity, the "no economically viable use" concept of the *Agins* test. What has emerged is a bright-line rule against government regulation that totally deprives landowners of any productive use of their property.

III. THE *LUCAS* DECISION.

A. *The South Carolina Beachfront Management Act.*

South Carolina's original shoreline regulation statute, enacted in 1977, required landowners to obtain permits from the Coastal Council before building homes or other structures in "critical areas."¹⁵⁶ This included beaches and primary sand dunes.¹⁵⁷ However, the 1977 Act gave the Coastal Council no control over residential development landward of existing beaches.¹⁵⁸ In 1987, a Blue Ribbon Committee estab-

147. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981).

148. Peterson, *supra* note 76, at 57.

149. Thomas Ross, *Modeling and Formalism in Takings Jurisprudence*, 61 NOTRE DAME L. REV. 372, 375-76 (1986) (*Penn Central* balancing approach criticized as "stochastic" because of indeterminacy).

150. Petersen, *supra* note 58, at 1317.

151. *Id.*

152. Note, *Taking a Step Back: A Reconsideration of the Takings Test of Nollan v. California Coastal Commission*, 102 HARV. L. REV. 448, 455-58 (1988).

153. *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir. 1987) ("the precise meaning of 'economically viable use' of land is elusive and has not been clarified by the Supreme Court").

154. *Loretto*, 458 U.S. at 426.

155. See Krueger, *supra* note 89, at 905 ("The [*Nollan*] Court's description of the degree of fit required between the ends and means of land-use regulations seems to signal a much stronger examination of legislative purpose.").

156. S.C. CODE ANN. § 48-39-130(A) (1987).

157. *Id.* § 48-39-10(j).

158. Zalkin, *supra* note 6, at 79.

lished by the Coastal Council to study erosion control, recommended a setback program that would move development sufficiently inland so that residential structures would not be threatened by the natural erosion cycle.¹⁵⁹ This suggestion led to the enactment of the 1988 Beachfront Management Act (the Act).¹⁶⁰

The Act provided for the establishment of "baselines" and construction setback lines in coastal regions.¹⁶¹ The Act also distinguished between standard erosion zones and inlet erosion zones. A standard erosion zone was defined as a segment of shoreline that was subject to the same set of coastal processes, had a fairly constant range of profiles and sediment characteristics, and was not influenced directly by tidal inlets or associated inlet shoals.¹⁶² The Act defined an inlet erosion zone as a segment of shoreline along or adjacent to a tidal inlet that was directly influenced by the inlet and the inlet's associated shoals.¹⁶³

Ordinarily, the baseline in the standard erosion zone would be located along the crest of the primary oceanfront sand dunes in that area.¹⁶⁴ However, if the shoreline was altered, either naturally or because of artificial structures, the baseline was to be placed where the crest of the primary oceanfront sand dunes would have been if the shoreline had not been altered.¹⁶⁵ Where inlets had not been stabilized by jetties, groins, or other structures, the baseline was to be located at the most landward point of any erosion in the last forty years unless the best available scientific and historical data indicated that the shoreline was unlikely to return to its former location.¹⁶⁶

Once a baseline was established in a coastal area, the Act directed the Coastal Council to establish a setback line landward of the baseline. This setback line would be either forty times the annual erosion rate or twenty feet, whichever was greater.¹⁶⁷ The Act generally prohibited the construction of habitable structures seaward of the setback line.¹⁶⁸ Normal repairs were allowed,¹⁶⁹ but a structure that had been completely destroyed could only be replaced if certain conditions were met.¹⁷⁰ Fur-

159. Newman J. Smith, *Analysis of the Regulation of Beachfront Development in South Carolina*, 42 S.C.L. REV. 717, 720 (1991).

160. 1988 S.C. Acts 634, codified at S.C. CODE ANN. §§ 48-39-10, 48-39-130, and 48-39-270 to 48-39-360 (Law. Co-op. Supp. 1991).

161. The Act required the Coastal Council to establish "interim" baseline and setback lines by the Act's effective date. *Id.* § 48-39-280(C). The 1990 amendments required the Council to establish final baselines and setback lines prior to July 3, 1991. *Id.*

162. *Id.* § 48-39-270(A)(6).

163. *Id.* § 48-39-270(A)(7). The property in *Lucas* was located in an inlet erosion zone. *Lucas*, 112 S. Ct. at 2889 n.1.

164. *Id.* § 48-39-280(A)(1).

165. *Id.*

166. *Id.* § 48-39-280(A)(2). Baselines within inlet erosion zones were to be calculated in the same manner as baselines in standard erosion zones. *Id.* § 48-39-280(A)(3).

167. *Id.* § 48-39-280(B).

168. *Id.* § 48-39-290.

169. *Id.* § 48-39-290(B)(1)(b)(i).

170. The new structure must not be larger, longer along the coastline, or closer to the sea than the original structure. Furthermore, the new structure must be moved as far landward as possible. *Id.* § 48-39-290(B)(1)(b)(iv).

thermore, no damaged structure could be reconstructed seaward of the baseline.¹⁷¹ Finally, new erosion control structures were banned outright by the Act¹⁷² and replacement of damaged structures was severely restricted.¹⁷³

Some of the restrictions in the Act were later relaxed by the Legislature in 1990 to alleviate some of the hardships caused by Hurricane Hugo.¹⁷⁴ For example, limited construction was allowed between the baseline and the setback line.¹⁷⁵ In addition, the 1990 amendments authorized the Coastal Council to permit construction seaward of the baseline in certain situations.¹⁷⁶ Finally, the amendments repealed a provision that required landowners to replace, on an annual basis, all sand in front of their property lost through erosion if they replaced habitable structures or erosion control devices.¹⁷⁷

B. *The State Court Opinion.*

*Lucas v. South Carolina Coastal Council*¹⁷⁸ was one of several challenges to the validity of South Carolina's 1988 Beachfront Management Act.¹⁷⁹ In 1986, the plaintiff in *Lucas* purchased two unimproved beach-

171. *Id.* § 48-39-290(B)(1)(b)(iv)(d).

172. *Id.* § 48-39-290(B)(2)(a).

173. The Act provides that an existing erosion control structure may not be replaced if more than 80% of the "above grade" portion is destroyed. *Id.* § 48-39-290(B)(2)(b)(i). That percentage drops to 67% in 1995 and 50% in the year 2005. *Id.* §§ 48-39-290(B)(2)(b)(ii), 48-39-290(B)(2)(b)(iii).

174. *Zalkin*, *supra* note 6, at 221.

175. *Id.* § 48-39-290(B)(1)(a). Houses of less than 5000 square feet were allowed within this area if no portion was constructed on a primary oceanfront sand dune and if the structure was moved as far landward as possible.

176. *Id.* § 48-39-290(D)(1).

177. *Id.* § 48-39-350(A)(6).

178. 112 S. Ct. 2886 (1992).

179. See *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991); *Chavous v. South Carolina Coastal Council*, 745 F. Supp. 1168 (D.S.C. 1990), *rev'd sub nom.* *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991). *Esposito* and *Chavous* involved property in Hilton Head, South Carolina. The parties in *Esposito* owned improved property located partially seaward of a baseline established by the Coastal Council pursuant to the 1988 Act. The act prohibited repair or additions to structures located in this "dead zone." 939 F.2d at 167. The landowners brought a facial challenge to the Act, claiming that it constituted a taking of their property. The trial court, however, ruled in favor of the Coastal Council. On appeal, the Circuit Court applied the *Agins* test. First, it held that the state had an important interest in protecting its beaches and that the Act was substantially related to the achievement of this goal. *Id.* at 169. Then the court found that the Act did not deprive the landowners of all viable use of their property because it permitted them to use it in the same manner as they did before the statute's enactment. *Id.* at 170. Therefore, the court upheld the validity of the 1988 Act.

In *Chavous*, two landowners were denied permission to construct a house on a vacant parcel of beachfront property. The landowners sued for money damages and injunctive relief. The trial court ruled that the Eleventh Amendment prohibited a federal court from awarding damages against the state. However, the court did find that the 1988 Act amounted to a taking of the landowners' property and enjoined the Coastal Council from enforcing the setback restriction against them. 745 F. Supp. at 1172. The case was consolidated with *Esposito* on appeal and the circuit court ruled that the 1990 amendments obviated the need for an injunction. See *Esposito*, 939 F.2d at 171. The court expressed no opinion on whether the 1988 Act constituted a temporary taking of the landowners' property between 1988 and 1990.

Beard v. South Carolina Coastal Council, 403 S.E.2d 620 (S.C. 1991), decided by the

front lots on the Isle of Palms near Charleston, South Carolina for \$975,000.¹⁸⁰ The owners of all of the adjacent tracts constructed single-family homes on their property and Lucas intended to do the same. At the time Lucas purchased the property, neither lot was subject to regulation under the existing Coastal Management Act¹⁸¹ and, therefore, the lots were not subject to regulation by the Coastal Council. However, the Act mandated the baseline be fixed some distance landward of the Lucas property¹⁸² because the shoreline along this property had fluctuated significantly over the past forty years.¹⁸³ The construction setback line was located even further inland. Consequently, Lucas was prohibited by the Act from building a structure on either lot except for a small deck or walkway.¹⁸⁴

Lucas brought suit against the Coastal Council, alleging that the building restriction constituted a taking of his property without just compensation. The trial court found in his favor and awarded Lucas more than \$1.2 million.¹⁸⁵ This decision, however, was reversed on appeal by a divided South Carolina Supreme Court.¹⁸⁶

Lucas did not question either the objectives of the Act or the means chosen by the legislature to achieve these objectives. Instead, he claimed that the statute's provisions, as applied to him, deprived him of "all economically viable use" of his property.¹⁸⁷ The majority opinion acknowledged that economic impact was a relevant factor under the *Key-stone's* multifactor analysis.¹⁸⁸ However, the opinion preferred to rely on a line of United States Supreme Court cases that upheld regulations without requiring just compensation when the state acted in order to

South Carolina Supreme Court shortly before its ruling in *Lucas*, involved a challenge to the 1977 Coastal Management Act. In that case, several landowners brought suit to compel the Coastal Council to allow them to construct a bulkhead across their beachfront property. The lower court held that denial of the necessary permit amounted to a taking of the plaintiffs' property. *Id.* at 621. On appeal, the South Carolina Supreme Court concluded that enforcement of the restriction would have little impact of the property. The court also declared that the state did not have to compensate a landowner when the restriction was intended to prevent a serious harm to the public. Accordingly, the court upheld Coastal Council's decision. *Id.* at 622.

180. *Lucas*, 112 S. Ct. at 2889.

181. *Id.* at 2889. At the time of purchase, the plaintiff's lots were located approximately 300 feet from the beach and dune line. *Id.* The 1977 Act only regulated "critical areas." Critical areas did not extend beyond existing beaches and primary sand dunes. See Smith, *supra* note 159, at 717-18.

182. The area in question was located in an inlet erosion zone that had not been stabilized by jetties, terminal groins or other structures. *Lucas*, 112 S. Ct. at 2889 n.1. Consequently, as required by the 1988 Act, the baseline was fixed at the most landward point of the shoreline over the past 40 years.

183. Over the past 40 years, the shoreline had been subjected to both accretion and erosion. For example, the plaintiff's property was under water between 1957 and 1963. Since 1963, the shoreline had moved seaward. *Id.* at 2905.

184. See *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 896 (S.C. 1991).

185. *Id.* at 896.

186. *Id.* at 902.

187. *Id.* at 896.

188. *Id.* at 899. These factors are: (1) the economic impact of the regulation; (2) the regulation's interference with investment-backed expectations; (3) the character of the government action; and (4) the nature of the state's interest in the regulation. See *Key-stone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

prevent a serious harm to the public.¹⁸⁹ This was, of course, nothing more than the old "noxious use" rule. The majority opinion treated this as a *per se* rule: if the regulation is aimed at preventing a noxious use, the state is never required to compensate, regardless of how much the landowner is harmed.¹⁹⁰

The majority opinion then concluded that since the landowner had not challenged the Act's legislative findings that new construction causes serious public harm,¹⁹¹ he had conceded that his proposed use would be harmful and thus fall within the noxious use no compensation rule.¹⁹² Thus, the majority concluded, Lucas was not entitled to compensation even though the regulation deprived him of all economically viable use of his property.¹⁹³

In a strong dissent, two members of the South Carolina court expressed disagreement with the reasoning of the majority opinion. The dissenting opinion relied on the two-factor test of *Agins*.¹⁹⁴ According to this approach, a land use regulation would constitute a taking if it did not substantially advance legitimate state interests *or* if it denied an owner all economically viable use of his land.¹⁹⁵ Thus, according to the dissent, the court must first examine the purpose of the regulation.¹⁹⁶ This inquiry would lead to one of three possible conclusions: (1) the regulation was unconstitutional because the public purpose for which it was enacted was not considered to be sufficient or legitimate; (2) the regulation was designed to prevent a nuisance and, therefore, no compensation was required; or (3) the regulation was not designed to prevent a nuisance, but did substantially advance other legitimate state interests. In this latter situation, a taking would occur if the landowner was deprived of all economically viable use of his land.¹⁹⁷

Unlike the majority, the dissenters did not regard the legislative findings of fact as conclusive on the issue of whether the regulated activity caused serious harm to the public. The dissent contended that such an approach would allow the state to regulate without paying compensation simply by calling that which it seeks to prevent a nuisance.¹⁹⁸ The dissent then determined that the primary purpose of the Act was not nuisance prevention since the activities and effects that the Act sought to

189. *Lucas*, 404 S.E.2d at 899. The court did not specifically indicate how this no compensation rule fit within the *Keystone* framework, but presumably it felt that it was an aspect of the nature of the state's interest in regulation.

190. *Id.* at 900-01. The court cited *Carter v. South Carolina Coastal Council*, 314 S.E.2d 327 (S.C. 1984), as an example of the application of the noxious use rule in South Carolina.

191. See S.C. CODE ANN. § 48-39-250(4) (Law. Co-op. Supp. 1991) (development site too close to beach/dune system jeopardizes the stability of this system, accelerates erosion, and endangers adjacent property).

192. *Lucas*, 404 S.E.2d at 900.

193. *Id.* at 902.

194. See *Agins v. Tiburon*, 447 U.S. 255 (1980).

195. *Id.* at 260.

196. *Lucas*, 404 S.E.2d at 906.

197. *Id.* at 906.

198. *Id.* at 905.

prevent were not sufficiently injurious to be considered "noxious."¹⁹⁹ Turning to the second factor of the *Agins* test, the dissent concluded that the restriction on construction effectively destroyed the market value of the plaintiff's property.²⁰⁰

C. *The Supreme Court Opinion.*

On the last day of the October 1991 Term, Justice Scalia, joined by Chief Justice Rehnquist and Justices White, O'Connor, and Thomas, issued an opinion reversing the judgment of the South Carolina Supreme Court.²⁰¹ Justice Kennedy concurred in the result, but preferred to decide the case by using an investment-backed expectations test instead of the categorical rule proposed by Justice Scalia.²⁰² Justice Blackmun²⁰³ and Justice Stevens²⁰⁴ each wrote a dissenting opinion and Justice Souter issued a separate statement on the question of ripeness.²⁰⁵

Writing for the majority, Justice Scalia first determined that the case was ripe for review by the Court.²⁰⁶ He then announced a categorical rule under which compensation would be required whenever a regulation deprived a property owner of "all economically viable use."²⁰⁷ Furthermore, the landowner would be entitled to compensation under these circumstances even though the stated purpose of the regulation was to prevent harm to the public.²⁰⁸ However, Justice Scalia did concede that the government would not be required to compensate a property owner for prohibition of uses that were not permitted under preexisting background principles of nuisance and property law.²⁰⁹

1. *Ripeness.*

Lucas did not challenge the Act on its face; he merely objected to the Act as applied to his property.²¹⁰ However, between the time Lucas brought suit and the time his case was decided by the South Carolina Supreme Court, the legislature amended the Act to create a special permit procedure under which a landowner could request the Coastal Council to allow construction seaward of the setback line.²¹¹ The Council, therefore, argued that the Court should not review the landowner's permanent takings claim until after he had requested, and been denied, a special permit to build.²¹²

199. *Id.* at 906.

200. *Id.* at 907.

201. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2902 (1992).

202. *Id.* at 2903.

203. *Id.* at 2904-17.

204. *Id.* at 2917-25.

205. *Id.* at 2925-26.

206. *Id.* at 2891-92.

207. *Id.* at 2895.

208. *Id.* at 2899.

209. *Id.* at 2900.

210. *Id.* at 2907 n.4.

211. S.C. CODE ANN. § 48-39-290(D)(1) (Law. Co-op. Supp. 1991).

212. *Lucas*, 112 S. Ct. at 2891.

The Court had previously addressed the ripeness issue in *MacDonald, Sommer & Frates v. Yolo County*.²¹³ In *MacDonald*, a developer, whose proposed plan was rejected, claimed that this action effectively restricted his property to unsuitable uses.²¹⁴ However, the Court declared that it could not decide whether a taking had occurred until the county had made a "final and authoritative determination" of the type and intensity of development that it would permit on the plaintiff's property.²¹⁵

Justice Scalia agreed that the landowner's permanent takings claim was not ripe for review as long as he could apply for a special permit to build houses on his lots.²¹⁶ However, Justice Scalia argued that the Court could review a temporary takings claim,²¹⁷ notwithstanding the establishment of a special permit procedure in 1990.²¹⁸ According to Justice Scalia, even if Lucas eventually obtained a special permit to build on his beachfront lots, the state supreme court decision upholding the validity of the statute effectively foreclosed any claim for loss of use of the property between 1988 and 1990.²¹⁹ On this basis, Justice Scalia concluded that the Court could review the landowner's temporary takings claim.²²⁰

Considering the availability of a special permit procedure, it is rather surprising that a majority of the Court was willing to decide the *Lucas* case. The Court could have vacated the judgment of the South Carolina Supreme Court and remanded it back to the state courts for further consideration in light of the 1990 amendments. At that point, Lucas could have brought an action for a temporary taking in state court.²²¹ However, as Justice Blackmun observed, "Clearly, the Court was eager to decide this case."²²²

Although Justice Souter and the dissenters disagreed with the Court's action, it can be defended on two grounds. First, it would have been unfair to require the landowner, who brought his case before three courts, to then go through a lengthy and uncertain administrative process followed by additional litigation, to find out whether or not he

213. 477 U.S. 340 (1986).

214. *Id.* at 344.

215. *Id.* at 348; see also *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190-91 (1985) (factors involved in taking issue could not be properly evaluated until agency had made a final, definitive decision about how the regulation would be applied to the claimant's property).

216. *Lucas*, 112 S. Ct. at 2891.

217. The Court acknowledged that compensation was required for a temporary regulatory taking in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321 (1987).

218. The special permit procedure became available after the *Lucas* case was argued but before it was decided by the South Carolina Supreme Court. *Lucas*, 112 S. Ct. at 2890-91.

219. *Id.* at 2891-92.

220. *Id.* Justice Kennedy, in a concurring opinion, agreed that the landowner's claim for a temporary regulatory taking claim was ripe. *Id.* at 2902.

221. *Id.* at 2909 n.7.

222. *Id.* at 2909.

could build a house on his property.²²³ Second, the *Lucas* case presented an excellent opportunity for the Court to shed some light on the takings issue.

2. The Categorical Rule.

Justice Scalia observed that there were at least two types of regulatory action that required compensation "without case-specific inquiry into the public interest advanced in support of the restraint."²²⁴ The first involved physical invasions or appropriations of private property; the second included cases where government regulation denied all economically beneficial or productive use of the land.²²⁵ Since the state courts had conceded that the regulation completely destroyed the economic value of the beachfront lots, Justice Scalia believed that the only issue before the Court was whether compensation could be required in this situation when the purpose of the regulation was to prevent a serious harm to the public.

Justice Scalia concluded compensation was necessary when a regulation deprived a landowner of all economically beneficial use of his or her property.²²⁶ He declared that a regulation that allowed no economically beneficial use did not merely adjust "the benefits and burdens of economic life" in a manner that secured an "average reciprocity of advantage" to everyone concerned; rather, the effect of such a regulation was similar to a physical appropriation.²²⁷ Furthermore, because confiscatory regulations were extremely rare, Justice Scalia did not feel that a compensation requirement in such cases would impair vital governmental functions.²²⁸ Finally, Justice Scalia claimed that a categorical rule would discourage local governments from pressing private property into public service under the guise of mitigating some public harm.²²⁹

The case for a categorical rule in "total deprivation" cases is a compelling one. If the essential meaning of the Takings Clause is that the rights of individuals should not be sacrificed to promote some greater public good,²³⁰ a rule that vindicates that principle is completely appropriate. The categorical rule promulgated in *Lucas* does not insulate property owners against reasonable regulation; it merely requires the state to exercise its power of eminent domain when it destroys the value of an individual's property in order to achieve some otherwise desirable governmental objective.

There may, however, be some problems with the application of Justice Scalia's categorical rule. For example, the concept of "deprivation

223. Cf. Burling, *supra* note 113, at 346 (arguing that the cost of multiple administrative proceedings can exhaust a property owner's resources).

224. *Lucas*, 112 S.Ct. at 2893.

225. *Id.*

226. *Id.* at 2895.

227. *Id.* at 2894.

228. *Id.*

229. *Id.* at 2894-95.

230. See generally EPSTEIN, *supra* note 58.

of all economically valuable use" may be indeterminate.²³¹ Because this concept is central to operation of the categorical rule, it should have been fleshed out more in *Lucas*.²³² For example, does this mean that uses should be considered "economically valuable" only if they are appropriate to the physical character of the land, to its geographical location, and to the land-use patterns of the surrounding area?²³³ Hopefully, in future decisions, the Court will give the term "deprivation of all economically valuable use" an interpretation that is consistent with the rationale behind categorical rule. Another problem is that of determining which property interests should be taken into account in deciding whether a landowner has suffered a total deprivation.²³⁴ However, as discussed earlier, this difficulty arises whenever economic loss is calculated in fractional terms, as it is in the diminution-in-value test and *Penn Central's* economic impact test.²³⁵ Therefore, the "conceptual separation" problem is not unique to the categorical rule and should not be cited a reason for rejecting Justice Scalia's categorical approach to total deprivations.

3. The Noxious Use Rule.

As the dissenters pointed out, the categorical rule announced in *Lucas* was inconsistent with *Mugler* and a long line of other noxious use cases. Rather than overrule these cases directly, Justice Scalia attempted to incorporate them into a takings formula based on the *Agins* two part test. Thus, Justice Scalia characterized the noxious use rule as the progenitor of the principle that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests.'" ²³⁶ In this fashion, he transformed the noxious use rule from a doctrine that denied compensation into a doctrine that invalidated police power regulations because they failed to satisfy the first part of the *Agins* test. According to this analysis, a regulation that was intended to control a noxious use met the first requirement of *Agins*, but compensation would still be required under the second part of the *Agins* test if the regulation deprived the landowner of all economically beneficial use of his or her property.²³⁷

Justice Scalia's attempt to link the noxious use rule with substantive due process was probably ill-advised. To be sure, many of the early noxious use cases were primarily concerned with the state's power to regu-

231. *Lucas*, 112 S. Ct. at 2913.

232. In fairness to Justice Scalia, it should be pointed out that the concept of deprivation of all economically valuable use originated in the *Agins* case. In the 12 years since *Agins* was decided, no one on the Court has ever attempted to explain what this concept means.

233. For example, in *Lucas*, virtually the entire 3 1/2 mile beachfront side of the Wild Dunes Resort was occupied by single family homes, condominiums or resort-owned recreational facilities. To suggest, therefore, that the lots had economic value because the landowner could "picnic, swim, camp in a tent, or live on the property in a moveable trailer" was inconsistent with this standard.

234. *Id.* at 2913, 2919-20.

235. See Radin, *supra* note 126, at 1676.

236. *Lucas*, 112 S. Ct. at 2897.

237. *Id.* at 2898-99.

late, rather than with the effect of the regulation on the claimant; but the rule, at least in the twentieth century,²³⁸ has been predominantly associated with takings analysis, not with substantive due process.²³⁹ Nor, can it be said, as Justice Scalia suggested, that the noxious use rule does not allow deprivation of all economic value.²⁴⁰ Even though many of the regulations in question merely prohibited noxious uses,²⁴¹ their practical effect was to render the property useless and unproductive.²⁴² The inescapable conclusion, therefore, is that the noxious use rule authorizes total deprivation of economic benefit and, as such, is completely inconsistent with Justice Scalia's categorical rule.

The categorical rule announced in *Lucas*, however, not only rejects the noxious use rule, but also abrogates the harm/benefit test. The harm/benefit test provides that no taking occurs if a regulation merely prevents property owners from causing harm to others, although compensation will be required if the purpose of the regulation is to confer a benefit on the public that it does not already enjoy.²⁴³ It is clear that the no taking/no compensation aspect of this rule applies even when the regulation allows no profitable use of the property.²⁴⁴ For this reason, the harm/benefit test is often relied upon by state courts to uphold restrictive environmental regulations.²⁴⁵ Now, as a result of the *Lucas* decision, state courts will no longer be able utilize the harm/benefit test to uphold regulations that deprive landowners of all beneficial use of their land.

This repudiation of the harm/benefit test is long overdue. The harm/benefit approach is analytically unsound because the distinction between preventing a harm and providing a benefit is largely illusory.²⁴⁶ Furthermore, the harm/benefit test is easily manipulated because the concept of harm can be expanded to cover just about anything the gov-

238. See, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590, 596 (1962) (upholding a local ordinance which prevented gravel pit from continuing in business); *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (upholding law that called for the destruction of infected cedar trees); *Samuels v. McCurdy*, 267 U.S. 188, 195-96 (1925) (upholding seizure of liquor in private homes).

239. See, e.g., Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity*, 63 ST. JOHNS L. REV. 433, 459 (1988) (approving the no compensation aspect of the noxious use rule); but see Stoebuck, *supra* note 144, at 1062 (arguing that the noxious use rule is really a due process test, not a takings test).

240. *Lucas*, 112 S. Ct. at 2899.

241. See Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 771 (1988).

242. *Lucas*, 112 S. Ct. at 2918-19.

243. Peterson, *supra* note 76, at 106.

244. Hunter, *supra* note 49, at 324.

245. See *Carter v. South Carolina Coastal Council*, 314 S.E.2d 327, 329 (S.C. 1984) (upholding a prohibition against filling in wetlands); *Graham v. Estuary Prop. Inc.*, 399 So. 2d 1374, 1380-83 (Fla. 1981) (upholding a ban on destruction of mangrove forest); *Just v. Marinette County*, 201 N.W.2d 761, 767-68 (Wis. 1972) (upholding ordinance that regulated filling along banks of navigable lakes).

246. *Lucas*, 112 S. Ct. at 2897 ("the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder"). See also Connors, *supra* note 83, at 184; Williams, Jr. et al., *supra* note 133, at 221.

ernment wants to regulate or prohibit.²⁴⁷ This has allowed some courts to uphold confiscatory regulations while giving little or no consideration to their effect on property owners.²⁴⁸

4. The "Nuisance Exception."

Justice Scalia declared that when the government deprived a landowner of all economically beneficial use, it could avoid the duty to compensate only by showing that the use interest destroyed by the regulation had never been part of the landowner's title.²⁴⁹ Furthermore, Justice Scalia warned, the notion that title to land was subject to an implied limitation that the state could subsequently eliminate all economically valuable use was "inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."²⁵⁰

According to Justice Scalia, limitations on land use that relieved the government of the duty to compensate "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."²⁵¹ Any inquiry on this issue would ordinarily entail an analysis of: (1) the degree of harm to public lands or resources, or adjacent property, posed by the claimant's proposed activities; (2) the social value of the claimant's activities and their suitability to the locality in question; and (3) the relative ease with which the alleged harm could be avoided through measures taken by the claimant, the government, or adjacent landowners.²⁵² As Justice Scalia himself admitted, courts examined these same factors to determine the existence of a private nuisance.²⁵³ Justice Scalia also pointed out that the fact that a particular use has been engaged in by similarly situated owners ordinarily imported a lack of any common-law prohibition, as did the fact that other landowners, similarly situated, were permitted to continue the use denied the claimant.²⁵⁴

Finally, Justice Scalia declared that this issue was one of state law that must be decided by the state courts on remand. However, he suggested that common-law principles would rarely prevent all construction or improvement on a landowner's property.²⁵⁵ Furthermore, Justice Scalia emphasized that, on remand, the state could not simply cite legislative findings or make conclusive applications of common-law maxims

247. Berchin, *supra* note 84, at 911.

248. In *Lucas*, for example, the state court accepted at face value the Legislature's conclusion that beach erosion caused harm to beach/dune areas, that new construction contributed to beach erosion, and that the state could, therefore, prohibit new construction without payment of compensation, regardless of its effect on landowners. *Lucas*, 404 S.E.2d at 900-02.

249. *Lucas*, 112 S. Ct. at 2899. Justice Stevens labeled this as a "nuisance exception." *Id.* at 2920.

250. *Id.* at 2900.

251. *Id.*

252. *Id.* at 2901 (citing RESTATEMENT (SECOND) OF TORTS §§ 826-831 (1977)).

253. *Id.*

254. *Id.*

255. *Id.*

in order to sustain the regulation.²⁵⁶ In effect, the state would have to show that construction of a house on the beachfront property would constitute a common-law nuisance.²⁵⁷

In the abstract, no one could disagree with the proposition that no taking can occur unless the claimant is deprived of a legally recognized property interest.²⁵⁸ Nevertheless, the dissenters expressed great concern about the operation of the nuisance exception in Justice Scalia's takings framework. These concerns, however, seemed to relate more to the categorical rule rather than the nuisance exception.

One argument, for example, was that the categorical rule and nuisance exception were unnecessary because legislatures could make determinations about background principles of nuisance or property law as effectively as courts.²⁵⁹ In effect, every new regulation represents a legislative readjustment of nuisance or property principles; thus, the legislative act that establishes the regulation would also place the regulated activity within the nuisance exception by declaring it to be unlawful. This is essentially how the harm/benefit test works. However, the nuisance exception in *Lucas* quite properly places the responsibility for determining background principles on the courts. Courts have a clear institutional advantage over legislatures when it comes to making decisions about existing nuisance and property law. Legislatures are inherently political institutions which often represent narrow special interest groups rather than the general public.²⁶⁰ Courts, on the other hand, are experienced in dealing with legal concepts and are more likely to be neutral decision-makers.

It was also suggested that the nuisance exception would have the effect of protecting existing lawful uses of property against subsequent prohibition.²⁶¹ It is true that under Justice Scalia's takings framework, the state legislature could not unilaterally characterize some activity as a nuisance and thereby prohibit it completely without payment of compensation. That does not mean, however, that this new takings formula "effectively freezes the State's common law, denying the legislature much of its power to revise the law governing the rights and uses of property."²⁶² Background principles of nuisance and property law are still free to change over time as they always have in the past.²⁶³

In sum, the nuisance exception is a logical corollary to Justice

256. *Id.*

257. *Id.* at 2901-02.

258. See, e.g. *Gardner v. Michigan*, 199 U.S. 325, 330-31 (1905); *New Orleans Gas Light Co. v. Drainage Comm'n*, 197 U.S. 453, 462 (1905).

259. *Lucas*, 112 S. Ct. at 2914 (Blackmun, J., dissenting).

260. Some theorists have argued that legislative decisions are seldom made on grounds of public policy. See generally William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987).

261. *Lucas*, 112 S. Ct. at 2921 (Stevens, J., dissenting).

262. *Id.*

263. For a discussion of changes in the law of prescription, implied dedication, custom, and the public trust doctrine and the effect of these changes on littoral rights. See *supra* nn. 12-44 and accompanying text.

Scalia's categorical rule. The dissenters' attacks on the nuisance exception lack plausibility and reflect their dislike of the categorical rule, rather than any genuine concern about the rule's exception.

IV. SOME THOUGHTS ON THE COURT'S NEW TAKINGS THEORY.

In recent years, the Supreme Court began to show more concern for property owners.²⁶⁴ *Kaiser Aetna*,²⁶⁵ *Loretto*,²⁶⁶ *First English*,²⁶⁷ and *Nollan*,²⁶⁸ along with *Lucas*, are illustrative of this trend. This portion of the Article examines some of the consequences of the Court's new treatment of regulatory takings claims.

A. *Effect on Property Owners.*

In the past, property owners who sought to challenge burdensome regulations faced a number of procedural and evidentiary barriers. For example, the Court rigorously enforced its rules relating to ripeness and exhaustion of administrative remedies, thereby delaying judicial review of any takings claim until dilatory local officials reached a final administrative decision on a landowner's request to develop.²⁶⁹ In addition, in its application of the "rational basis" test, the Court generally accepted at face value legislative findings about the public purpose served by the regulation and the effectiveness of the means employed.²⁷⁰ Furthermore, the Court often rejected takings claims even when a regulation imposed a severe burden on affected property owners.²⁷¹ All of this gave government agencies a decided advantage when property owners sought to challenge restrictive or oppressive regulations.

The Court's new takings jurisprudence improves the position of claimants somewhat at the expense of the government. The Court's willingness to accept the *Lucas* case for review suggests that it may be

264. *Burling*, *supra* note 113, at §13.

265. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

266. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

267. *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987).

268. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

269. *See, e.g., MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351-53 (1986) (developer whose initial development plan was turned down required to submit revised plan before bringing takings claim); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193-94 (1985) (claimant required to seek a variance from local zoning board before bringing takings claim).

270. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485-88 (1987) (agreeing that mining companies could be required to leave coal in place to protect surface owners from effects of subsidence); *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980) (agreeing that density requirements were necessary to protect city against consequences of urban growth); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 134-35 (1978) (agreeing that historic preservation law served a public purpose); *Goldblatt v. Hempstead*, 369 U.S. 590, 595-96 (1962) (agreeing that a ban on excavation promoted safety).

271. *See, e.g., Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (prohibition on the sale of privately-owned eagle feathers upheld); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962) (local ban on excavation below water table upheld even though it effectively destroyed claimant's gravel excavation business).

prepared to relax its ripeness and exhaustion rules, at least in cases where it is apparent that no change in position is likely to occur on the part of local legislators. This shift in the Court's approach is to be commended. While ripeness and exhaustion doctrines are obviously essential to the efficient operation of the judicial system, they can sometimes be unfair to landowners who are forced to expend time and money seeking variances and pursuing administrative appeals when it is obvious that permission to develop will ultimately be denied.²⁷²

The "rational nexus" requirement of *Nollan* also exemplifies the Court's newfound solicitude for property owners.²⁷³ It indicates that the Court is not going to automatically defer to implausible legislative statements of purpose, but instead will make an independent evaluation of the legislative purpose of a challenged regulation.²⁷⁴ This does not mean a return to the *Lochner*²⁷⁵ era when the Court felt free to make its own decisions about the social or economic wisdom of state legislation. Rather, it means that the Court will not be deterred by legislative assertions of public purpose from invalidating regulations, like that involved in *Nollan*, that are nothing more than blatant appropriations of private property.

The *Lucas* Court's repudiation of the noxious use and harm/benefit rules, insofar as they purport to authorize regulations that totally destroy the value of private property without compensation, will provide property owners with greater protection against overreaching by government officials and legislators who wish to please taxpayers by securing the benefits of public beaches and wildlife sanctuaries without paying for them.²⁷⁶ The holding in *Lucas* is also reassuring because it contradicts the certain radical notions about private property that have been espoused by a segment of the environmental movement.²⁷⁷

Finally, the *First English* decision, upholding a claim for a temporary taking, will discourage the enactment of clearly invalid regulations, because it imposes an economic cost in the form of damages on communities that act in such a manner. The holding in *First English* will encourage expeditious resolution of regulatory takings claims because it penalizes delay if the regulation is subsequently found to be invalid. In the past, regulatory agencies had no reason to move the decisional process along. Now the threat of a damage claim provides an incentive for these agencies respond more quickly to development requests.

272. Burling, *supra* note 113, at 346.

273. Lawrence, *supra* note 137, at 253.

274. Krueger, *supra* note 89, at 905.

275. 198 U.S. 45 (1905).

276. Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A. L. REV. 685, 697 (1986).

277. See, e.g., Hunter, *supra* note 49, at 317-20 (endorsing Aldo Leopold's theories of "land ethic" and "stewardship"); Large, *supra* note 85, at 1045 (because of spillover effects, "land cannot be neatly divided into mine and yours"). See also Devall, *The Deep Ecology Movement*, 20 NAT. RESOURCES J. 299 (1980).

B. *Effect on Land Use and Environmental Regulation.*

Even prior to the *Lucas* decision, some environmentalists criticized the Court's takings jurisprudence because, in their view, it unduly limited the government's power to protect ecological resources from destruction by private property owners.²⁷⁸ In *Lucas* itself, some members of the Court expressed concern that the new takings formula might be too restrictive.²⁷⁹ However, as the discussion below attempts to illustrate, the Court's new takings framework will not invalidate most existing forms of shoreline protection regulation.

1. Dune Protection Legislation.

Sand dunes stabilize beach areas, act as buffers against storms and provide a habitat for wildlife.²⁸⁰ At the same time, sand dunes and their associated vegetation are vulnerable to the effects of development.²⁸¹ Consequently, it makes sense to preserve the dune environment whenever possible. A few states enacted legislation that specifically protects sand dunes.²⁸² Typically, these statutes prohibit the destruction of dunes or construction near dune lines. In general, unless a lot is extremely shallow, compliance with dune protection regulations is not difficult. Therefore, the Court's new takings framework should have no significant effect on dune protection laws.

2. Beach Access Legislation.

Several states enacted beach access provisions.²⁸³ Obviously there is no constitutional problem with statutes that predicate public rights on existing property law concepts, such as prescription, implied dedication or custom. Development exactions are another matter. The mandatory dedication of an easement that runs from a public road to a beach might satisfy *Nollan's* rational nexus test if it was required of developers as part of the initial development approval process. This is because large-scale residential or commercial construction along a previously undeveloped shoreline might in fact interfere with existing public access. However,

278. See Hunter, *supra* note 49, at 320 ("Current takings doctrine does not adequately permit the government sufficient latitude to enforce the obligations land owners have toward the 'land community.'"); *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1620 (1978) (takings clause labeled as "the major obstacle to effective environmental land use regulation").

279. *Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring); *Id.* at 2922 (Stevens, J., dissenting).

280. Jeter M. Watson & Richard H. Sedgley, *Land Use Regulation by the Virginia Marine Resources Commission: The Virginia Wetlands Act and Coastal Primary Sand Dune Protection Act*, 7 VA. J. NAT. RESOURCES L. 381, 387-88 (1988).

281. Zalkin, *supra* note 6, at 213-14.

282. ME. REV. STAT. ANN. tit. 38, § 482 (1989); N.H. REV. STAT. ANN. § 215-A:3 (Supp. 1992); N.C. GEN. STAT. §§ 113A-113(b)(6)(a), 113A-120(a)(6) (West 1991); S.C. CODE ANN. § 48-39-130 (Law. Co-op. Supp. 1987); TEX. NAT. RES. CODE ANN. § 63.011 (West 1992); VA. CODE ANN. § 28.2-1400 (Michie 1992).

283. *E.g.*, CAL. PUB. RES. CODE § 30214 (West 1986 & Supp. 1992); N.C. GEN. STAT. §§ 113A-134.1 to 134.3 (1991); TEX. NAT. RES. CODE ANN. §§ 61.011-61.025 (West 1978 & Supp. 1992).

requiring individual lot owners to dedicate a portion of their land as a condition to obtaining a building permit, as was done in *Nollan*, should not be allowed. Once a shoreline area becomes developed, the government should pay for an easement if it wishes to provide public access to beach areas.

3. Construction Setback Lines.

Beach erosion is occurring in many areas of the country.²⁸⁴ As mentioned earlier, a number of states established fixed construction setback lines in coastal areas in order to control this problem.²⁸⁵ As long as setback lines are not located too far from existing shorelines, landowners should be able to coexist with them. A few states established floating construction setback lines.²⁸⁶ Floating setback lines are probably more effective erosion control devices than fixed ones.²⁸⁷ When this technique is employed, the setback line may be located a considerable distance inland if the shoreline fluctuates widely over time. Obviously, a deep setback line is more likely to cover an entire lot, as in *Lucas*, than a shallow one. Furthermore, the chances of a total deprivation are much greater when a setback is established along a fully developed shoreline. In fact, the floating setbacks are probably impractical in areas, such as Wild Dunes, where development occurs along an unstable shoreline.

4. Wetlands Protection Legislation.

The *Lucas* decision is likely to have its greatest impact on wetlands protection regulations. Coastal wetlands are extremely productive and valuable natural resources.²⁸⁸ The estuarine environment, however, is also highly vulnerable to the effects of development.²⁸⁹ For this reason, many states regulate dredging and filling in wetland areas.²⁹⁰ Unfortunately, wetlands are essentially worthless from the landowner's point of view if permission to dredge or fill is denied.²⁹¹

In the past, some courts upheld denials of dredge and fill permits on the theory that no compensation was required when the purpose of the regulation was to protect the estuarine environment from harm.²⁹²

284. Owens, *supra* note 45, at 626.

285. ALA. CODE § 9-7-10 (1987); DEL. CODE ANN. tit. 7, § 7004 (1991); HAW. REV. STAT. § 205A-43(a) (1991); ME. REV. STAT. ANN. tit. 38, § 438A(1) (1989 & Supp. 1991).

286. FLA. STAT. ANN. § 161.053 (West 1988); N.Y. ENVTL. CONSERV. LAW § 34-0103(3)(a) (McKinney 1984); N.C. GEN. STAT. § 113A-118 (1991); S.C. CODE ANN. § 48-39-290(B)(4) (Law. Co-op. Supp. 1991).

287. Hwang, *supra* note 46, at 13.

288. Binder, *supra* note 61, at 18-30.

289. See Hunter, *supra* note 49, at 339-40.

290. CAL. PUB. RES. CODE § 30233 (West 1986); FLA. STAT. ANN. §§ 403.91 to 403.929 (West 1986 & Supp. 1992); GA. CODE ANN. § 12-5-286 (Michie 1992); MD. NAT. RES. CODE ANN. § 9-202 (Supp. 1992); MISS. CODE ANN. § 49-27-9 (1992); N.H. REV. STAT. ANN. § 482-A:3 (1992); N.J. STAT. ANN. § 13:9A-4 (West 1991); R.I. GEN. LAWS § 46-23-18 (1991).

291. Large, *supra* note 90, at 4-5.

292. See, e.g., *Carter v. South Carolina Coastal Council*, 314 S.E.2d 327, 329 (S.C. 1984); *Graham v. Estuary Prop. Inc.*, 399 So. 2d 1374, 1381 (Fla. 1981).

However, that rationale is no longer valid after *Lucas*. State courts could rule that the destruction of wetlands was nuisance-like in terms of its effect on the public welfare,²⁹³ but it would be hard for them to justify such a conclusion in light of the fact that development activities in wetlands areas are not unusual even in this era of heightened environmental consciousness.²⁹⁴ Nor could a court avoid the effect of *Lucas* by arguing that title to wetlands does not carry with it any right to alter their natural state.²⁹⁵ The logic *Lucas* appears to support the existence of a landowner's right to improve or develop property that is not economically productive in its natural state.²⁹⁶ Therefore, *Lucas* would seem to dictate that the states must either place generous variance provisions in their wetlands protection statutes or create programs to purchase development rights in wetland areas.

CONCLUSION.

The *Lucas* holding was a narrow one, covering only situations where a regulation completely destroys the economic value of a landowner's property. However, *Lucas*, when read together with other recent decisions, indicates that the Court shifted its takings doctrine in favor of landowners. The Court's implicit repudiation of the no compensation aspect of the harm/benefit test is particularly significant. Undoubtedly, the Court's new takings framework will impose some constraints on land use and environmental regulation. However, this is a price that must be paid if property rights are to be protected against unduly restrictive governmental regulation.

293. Cf. Coletta, *supra* note 124, at 357 (arguing that much development is nuisance-like in character and may thus fall within the an expanded nuisance exception principle).

294. It will be recalled that Justice Scalia cautioned in *Lucas* that "[t]he fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition though changed circumstances or new knowledge may make what was previously permissible no longer so." *Lucas*, 112 S. Ct. at 2901.

295. This notion was first proposed in *Just v. Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972). One commentator referred to this as the "when you buy a swamp you just get a swamp" theory of takings. See Burling, *supra* note 113, at 351.

296. *Lucas*, 112 S. Ct. at 2901 ("It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of land.").